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No. 02-

IN THE

Supreme Court of the United States

GARY MILLBROOK,

Petitioner,

v.

IBP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER
University of Washington
School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

JOHN F. DOAK*
KATZ, HUNTOON & FIEWEGER, P.C.
200 Plaza Office Building
1705 Second Avenue
P.O. Box 3250
Rock Island, IL 61204
(309) 788-5661

Attorneys for Petitioner

* *Counsel of Record*

174767

COUNSEL PRESS
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QUESTIONS PRESENTED

(1) In an action alleging unlawful discrimination in promotions, is evidence that the plaintiff was the best qualified candidate not probative of discrimination unless the difference in qualifications was so extreme that "no reasonable employer could believe that it selected the best candidate"?

(2) *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000), holds that a court may set aside a jury's finding of discrimination if *both* "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." Did the court of appeals err in overturning a jury finding of discrimination solely because the appellate court believed that the first *Reeves* requirement was met?

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Petitioner Gary Millbrook respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on February 20, 2002.

OPINIONS BELOW

The February 20, 2002 opinion of the court of appeals is reported at 280 F.3d 1169 (7th Cir. 2002), and is reprinted in Appendix A (1a-31a). The April 19, 2002 order of the court of appeals denying rehearing, which is not officially reported, is reprinted in Appendix D (38a-39a). The order of the district court denying the motion for judgment as a matter of law, which is not officially reported, is reprinted in Appendix E (40a). The judgment of the district court, entered on September 22, 2000, is reprinted in Appendix B (32a-33a). The jury verdict form was dated and filed September 21, 2000 and is reprinted in Appendix C (34a-37a).

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on February 20, 2002. A timely petition for rehearing and suggestion for rehearing en banc was denied on April 19, 2002. This court has jurisdiction pursuant to 28 U.S.C. § 1254(a).

STATUTE, CONSTITUTIONAL PROVISION AND RULE INVOLVED

Section 703(a)(1) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Rule 50(a)(1) of the Federal Rules of Civil Procedure provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under controlling law be maintained or defeated without a favorable finding on that issue.

STATEMENT OF THE CASE

Petitioner brought this action in the United States District Court for the Central District of Illinois, alleging that because of his race he had repeatedly been denied promotion to the position of Quality Control Inspector. Millbrook, who is black, alleged that during the years from 1996 to 1998 he had applied for that position on ten different occasions, and that in every instance was rejected in favor of a non-black candidate.

Millbrook asserted that in eight of the ten instances where he applied his rejection was racially motivated. Respondent IBP, Inc., admitted that Millbrook was qualified for the

quality control position, but insisted that it had chosen the non-black candidates over Millbrook because those candidates were better qualified. Much of the evidence at trial concerned the comparative qualifications of Millbrook and the eight candidates chosen to be Quality Control Inspectors. IBP relied in part on the results of interviews with Millbrook and others, asserting, for example, that in one instance Millbrook made a poor showing in an interview because "he failed to make eye contact and did not seem confident in his answers." (App. 12a).

The jury found that IBP discriminated against Millbrook on the basis of race when it filled a Quality Control Inspector vacancy in June, 1997, selecting DeWayne Harris, a white candidate, over Millbrook. The jury awarded Millbrook $7,500 in pain and suffering, $25,000 in lost wages, and $100,000 in punitive damages. The district judge denied a motion by IBP for judgment as a matter of law.

A sharply divided court of appeals reversed. The majority opinion insisted that none of the plaintiff's evidence, which had been credited by the jury, had any probative value whatsoever. Although there was substantial evidence that petitioner was more qualified than the white applicant who was awarded the position in question, the court insisted that such evidence by its very nature could not be probative of discrimination.

> *We now hold* that where an employer's proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants' competing qualifications *does not constitute evidence of pretext* "unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the

> plaintiff was clearly better qualified for the position at issue."

(App. 20a) (Emphasis added) (*quoting Deines v. Texas Dept. of Protective and Regulatory Services*, 164 F.3d 277 (5th Cir. 1999)).

The majority "adopt[ed] the standard . . . that comparative qualifications do not support a finding of pretext." (App. 23a). Thus, even though the jury might reasonably have concluded that petitioner was in fact more qualified, such an inference was devoid of probative significance. "[W]e are left with a case where there is *no* evidence of intentional race discrimination." (App. 29a). Proof that petitioner was in fact better qualified, the majority insisted, could not as a matter of law constitute "evidence that IBP lied about its reasons." (App. 27a). According to the panel, an employer's assertion that a discrimination plaintiff was rejected as less qualified cannot be called into question by evidence regarding the actual qualifications of the candidates involved, except where the differences in qualifications are so extraordinary as to demonstrate that "no reasonable employer could believe that it selected the best candidate." (App. 29a).

Judge Evans dissented. In barring the use of evidence of comparative qualifications, he insisted, the majority was effectively requiring a Title VII plaintiff to adduce direct evidence of discrimination.

> Discrimination today is rarely overt. Sometimes it works underground. In today's environment, it is unfair to require plaintiffs to produce smoking guns.

(App. 30a).

> [T]here was sufficient evidence to allow a reasonable jury to conclude that overall the company consistently chose the white candidate, and that in the case of Harris (who, unlike the other seven, may not have seemed to the jury to be the better candidate), the company's claim that it picked the better candidate without regard to race was a pretext to cover discriminatory behavior.

(App. 30a-31a).

Millbrook filed a timely motion for rehearing and suggestion for rehearing en banc. The motion for rehearing was denied. The suggestion for rehearing en banc was rejected by a vote of 6 to 5; Judges Ripple, Rovner, Evans, Williams and Diane Wood would have granted rehearing en banc.

REASONS FOR GRANTING THE WRIT

For more than twenty years this Court has held that a plaintiff alleging discrimination in promotions or hiring may seek to establish that claim by offering evidence that he or she was in fact better qualified than the candidate who was given the disputed position. Such evidence may persuade the trier of fact to disbelieve an employer's assertion that it rejected the plaintiff because he or she was less qualified, and to conclude that the proffered explanation was a pretext for discrimination. In recent years, however, a number of circuits have severely limited this method of proof.

The Seventh Circuit decision in this case applies the most recent and stringent version of that limitation: "comparative qualifications do not support a finding of pretext." (App. 23a)[1].

1. This view necessarily tainted the court of appeals' view that any evidence of pretext was too weak to support the jury's finding of discrimination.

(Cont'd)

Although the circuit court decisions applying this limitation suggest that there might be cases in which a disparity in qualifications would be sufficiently extreme to support a finding of discrimination, there appears to be only a single reported case in which a plaintiff was able to meet that extraordinarily demanding standard. The 6 to 5 division within the Seventh Circuit on this issue reflects a similar conflict among the courts of appeals.

I. Decisions Of This Court And Of Several Circuits Approve The Use Of Comparative Qualification Evidence To Prove Pretext

In individual promotion and hiring discrimination cases the comparative qualifications of the competing candidates is usually of central importance. After a plaintiff establishes a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the employer adduces evidence of a non-discriminatory reason for rejecting the plaintiff. Almost invariably the explanation proffered by the employer is that the plaintiff was less qualified than the individual who was awarded the position in question. Both parties offer evidence regarding the comparative qualifications of the candidates, and concerning the employer's standards for making the selection. If the trier

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(Cont'd)

This Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), only permits a court to overturn such a jury verdict if two requirements are met: (1) "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue", and (2) "there was abundant and uncontroverted independent evidence that no discrimination had occurred." 530 U.S. at 148. The court of appeals in this case overturned the jury's finding of discrimination solely because the court believed that the first requirement had been satisfied. The panel did not suggest that there was any exculpatory evidence of the sort require by *Reeves*. This portion of the opinion was squarely inconsistent with *Reeves*.

of fact concludes that the plaintiff was indeed the less qualified candidate, it will almost certainly hold that the promotion or hiring decision was non-discriminatory.

If, however, the trier of fact concludes that the employer selected the less qualified candidate, it may indeed infer that discrimination was the reason. Such an inference is not mandatory; the employer may simply have made a mistake, or may have been trying to conceal some other non-discriminatory but perhaps embarrassing motive. However, this Court has repeatedly made clear that evidence an employer promoted a less qualified candidate will be significantly probative of discrimination.

In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court held that an employer's decision to promote a less qualified candidate, although not unlawful per se, would provide support for a finding of discrimination.

> The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.

450 U.S. at 259. The central holding in *Burdine* was that the plaintiff bears the burden of persuasion regarding whether an employer's proffered explanation was a pretext for discrimination. In reaching its conclusion the Court explained:

> the defendant normally will attempt to prove the factual basis for its explanation. . . . [W]e are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext.

450 U.S. at 258. In a promotion case the comparative qualifications of the applicants are ordinarily the pivotal "factual basis" in question.

On two occasions since *Burdine* this Court has discussed the sufficiency of a factual record to support a finding of discrimination in hiring or promotions. *Anderson v. Bessemer City*, 470 U.S. 564 (1985) (hiring); *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711 (1983) (promotion). In both cases this Court relied heavily on evidence of comparative qualifications in concluding that a finding of discrimination would be upheld.[2]

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2. *Anderson*, 470 U.S. at 568-69

> the [district] court found that at the time the selection committee made its choice petitioner had been better qualified than Mr. Kinkaid to perform the range of duties demanded by the position. The court based this finding on petitioner's experience as a classroom teacher responsible for supervising schoolchildren in recreational and athletic activities, her employment as a hospital recreation director in the late 1950's, her extensive involvement in a variety of civic organizations, her knowledge of sports acquired both as a high school athlete and as mother of children involved in organized athletics, her skills as a public speaker, her experience in handling money . . . , and her knowledge of music, dance and crafts. . . . Noting that the position of Recreation Director involved more than the management of athletic programs, the court concluded that petitioner's greater breadth of experience made her better qualified for the position.

Aikens, 460 U.S. at 713-14 n.2

> Aikens . . . had more supervisory seniority and training and development courses than all but one of the white persons who were promoted above him. . . . Aikens had substantially more education than the white employees who were advanced ahead of him.

By the time of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), evidence of comparative qualifications was so widely accepted as a permissible method of proving discrimination that some lower courts mistakenly believed that it was the *only* permissible method. *E.g.*, *Young v. Lehman*, 748 F.2d 194, 198 (4th Cir. 1984)

> The rule in this circuit is that where relative qualifications are advanced as the non-discriminatory reason for an employment decision, the plaintiff has the burden of establishing that she was better qualified than the successful applicant. . . . Young had the burden of proving the reason pretextual, i.e. that she was better qualified.

In *Patterson* the trial judge instructed the jury that the black plaintiff was required to prove she was more qualified than the white applicant who had received the promotion in question.

This Court held that proof of comparative qualifications was a permissible, but not mandatory, method of establishing discrimination.

> [T]he District Court erred when it instructed the jury that petitioner had to prove that she was better qualified than the white employee who allegedly received the promotion. . . . [P]etitioner . . . must . . . have the opportunity to demonstrate that respondent's proffered reasons for its decisions were not its true reasons. . . . In doing so, petitioner is not limited to presenting evidence of a certain type. . . . Indeed, *she might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person*

> *chosen for the position*. The District Court erred, however, in instructing the jury that in order to succeed petitioner was *required* to make such a showing.

491 U.S. at 187-88 (first emphasis added).

Many circuits, not surprisingly, have followed the holdings of *Burdine* and *Patterson* that a plaintiff may establish pretext by offering proof of comparative qualifications.

In *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861 (8th Cir. 1997), the district court had refused to consider evidence regarding whether Chock or the candidates who were promoted were the most qualified. The district court reasoned:

> the Court has neither the power nor the ability to make such a business decision. In light of the myriad of suits alleging discrimination and the courts' function in reviewing these claims, the Court finds it necessary to reiterate that the federal court does not sit "as a super-personnel department that reexamines an entity's business decisions."

Chock, 113 F.3d at 864 (quoting district court opinion). But the Eighth Circuit reversed, holding that consideration of those comparative qualifications was mandatory:

> It appears from the above-quoted language that the court declined to review the relative qualifications of Chock and the persons selected for the positions. We do not condone such an approach. Where, as here, the employer contends that the selected candidate was more qualified for

> the position than the plaintiff, a comparative analysis of the qualifications is relevant to determine whether there is reason to disbelieve the employer's proffered reason for its employment decision. . . . [I]f such a comparison were to successfully challenge the employer's articulated reason, it "may serve as well to support a reasonable inference that discrimination was a motivating reason for the employer's decision." *Ryther v. KARE 11*, 108 F.3d 832, 836 (8th Cir. 1997).

113 F.3d at 864; *see Hase v. Missouri Div. of Employment Sec.*, 972 F.3d 893, 897 (8th Cir. 1992) ("Plaintiff's rank, her higher examination and performance ratings and her years of experience, when compared with [the successful male candidate's] supervisory experience and job recommendations, could reasonably lead a trier of fact to infer that Defendants' proffered reasons were pretextual.")

Similarly, in the Ninth Circuit comparisons of qualifications are frequently relied on as an appropriate method of determining whether discrimination has occurred. For example, in *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595 (9th Cir. 1993), the employer claimed it had denied a promotion to the plaintiff because he assertedly had difficulty communicating in English. The trial judge determined that Odima's English language skills were sound, and thus concluded that the employer's reason was pretextual. The court of appeals affirmed that conclusion.

> The court found . . . that [the plaintiff] could speak English "adequate to conduct himself in a business or social setting." We cannot second-guess these first-hand observations. . . . Moreover, we cannot assail the district court's finding that because the

> reason was unworthy of credence, it was pretextual. . . .

991 F.2d at 600. The employer in *Odima* had asserted that it had relied as well on other differences in ability; the court of appeals insisted that each proffered reason be examined separately by the trial court. The Ninth Circuit held that on remand the trial judge was to do so by focusing on the comparative qualifications of the two candidates. "[O]n remand, the district court must compare the qualifications of Odima and the successful candidates, but only to ferret out discriminatory motives." 991 F.2d at 802.

The Third Circuit relied on evidence regarding comparative qualifications to uphold a finding of age discrimination in *Seaman v. Coplay Cement Co.*, 26 F.3d 428 (1994). The employer in *Seaman* had explained that it had laid off the plaintiff while retaining younger employees because the retained workers were more able.

> Seaman . . . introduced evidence indicating that he had more experience in the cement industry than the younger salesmen retained by U.S. Cement, and was more qualified than some of the younger salesmen. That evidence . . . could have been weighed by the jury in rejecting U.S. Cement's explanation that it had retained the other salesmen instead of Seaman because they had superior sales skills.

26 F.3d at 433.

II. Several Circuits, Including The Seventh Circuit In This Case, Effectively Bar Use Of Such Comparative Evidence To Prove Discrimination

The decisions in the Third, Eighth and Ninth Circuits, and this Court's decisions in *Burdine* and *Patterson*, are in conflict with the decisions of other circuits, including that of the Seventh Circuit in this case.

Several circuits have largely prohibited plaintiffs' use of comparative evidence. The legal standard in these circuits is avowedly asymmetrical; employers may defeat discrimination claims by proving that the plaintiff was comparatively *less* qualified, but plaintiffs (generally) cannot support such claims by demonstrating that they were *more* qualified. Appellate courts applying this rule have repeatedly overturned findings of discrimination both by juries[3] (as occurred in the instant case) and by judges following bench trials[4]. These decisions, like the opinion in the court below, suggest that there could be an extreme case in which comparative evidence would be probative. But among the scores of such decisions there appears to be only a single case in which any plaintiff succeeded in meeting this strict standard.

The standard adopted by the Seventh Circuit is extraordinarily stringent.

> *We now hold* that where an employer's proffered non-discriminatory reason for its employment

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3. *Lee v. GTE Florida, Inc.*, 226 F.3d 1249 (11th Cir. 2000); *Alexander v. Fulton County, Georgia*, 207 F.3d 1308 (11th Cir. 2000); *Nichols v. Lewis Grocer*, 138 F.3d 563 (5th Cir. 1998); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438 (5th Cir. 1995).

4. *Odom v. Frank*, 3 F.3d 839 (5th Cir. 1993); *Sanchez v. Philip Morris Inc.*, 992 F.2d 244 (5th Cir. 1993).

> decision is that it selected the most qualified candidate, evidence of the applicants' competing qualifications *does not constitute evidence of pretext* "unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue."

(App. 20a) (Emphasis added) (*quoting Deines v. Texas Dept. of Protective and Regulatory Services*, 164 F.3d 277 (5th Cir. 1999).

Where an employer asserts (as virtually all do) that it rejected a plaintiff because he or she was less qualified, no inference can be drawn that this was not the employer's real reason even if (1) a reasonable jury *could* conclude the plaintiff was actually better qualified, (2) a reasonable jury *could* conclude that the plaintiff was *clearly* better qualified, or (3) any reasonable jury *must* conclude that the plaintiff was better qualified[5]. Only if any reasonable jury *must* conclude that the plaintiff was *clearly* better qualified could an inference of pretext be drawn. Any lesser quantum of proof would add "nothing" to the plaintiff's case. (App. 25a n.4).

This severe limitation on the use by plaintiffs of evidence of comparative qualifications derives from the Fifth Circuit decision in *Odom v. Frank*, 3 F.3d 839 (5th Cir. 1993). *Odom* was avowedly based on the premise that the holding in *Burdine* regarding the use of such comparative evidence seemed to be bad law in light of the subsequent decision in

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5. If the evidence adduced by the plaintiff were this decisive, the plaintiff would be entitled to partial summary judgement on the question of whether the plaintiff was actually the more qualified candidate, but the defendant (absent some other weighty evidence) still would be entitled to summary judgment on the merits.

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). After noting the holding in *Burdine* that a plaintiff's superior qualifications "may be probative of . . . pretex[t]," *Odom* admonished, "Recently, doubt has been cast on the continuing validity of this *Burdine* finding in light of *St. Mary's Honor Center v. Hicks*." 3 F.3d at 846 n.21. *Odom* did not explain what in *Hicks* raised questions about the vitality of *Burdine*, and the cases following *Odom* have largely ignored *Burdine*.

Some decisions, like that in the instant case, hold that evidence of comparative qualifications would be probative only if so extreme that no "*reasonable employer* could have concluded that [the plaintiff] was the better person for the job." (Emphasis added).[6] This effectively replaces the generally absolute prohibition against racial or other invidious discrimination with a sort of rational basis test; so long as a rational employer might have rejected the plaintiff, the discrimination claim will fail unless the employer was so inept as to leave a smoking gun of direct evidence. *See Bernales v. County of Cook*, 2002 WL 1022011 *3 (7th Cir.) (differences in qualifications were not "so absurd as to defy reason"); *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 103 (2d Cir. 2001) ("we cannot say that [the employer] was unreasonable in electing to offer" the position in question to candidate other than the plaintiff); *Ruiz v. Posadas de San Juan Associates*, 124 F.3d 243, 251

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6. *Bernales v. County of Cook*, 2002 WL 1022011 (7th Cir.) (*quoting Millbrook*); *Byrnie v. Town of Cromwell Board of Education*, 243 F.3d 93,103 (2d Cir. 2001) (*quoting Deines*); *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 357 (5th Cir. 2001) (*quoting Deines*); *Deines v. Texas Dept. of Protective and Regulatory Services*, 164 F.3d 277, 280 (5th Cir. 1999) ("disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.")

(1st Cir. 1997) ("it cannot be said that [the decision to hire another candidate rather than plaintiff] was so absurd as to defy rational belief."); *Lehman v. Prudential Insurance Co. of America*, 74 F.3d 323, 329 (1st Cir. 1996) ("We refuse to second guess Prudential's hiring decision . . . absent clearer evidence of irrationality"); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1446 (5th Cir. 1995) (plaintiff cannot question the motive behind employer's asserted promotion standards unless they are "so irrational or idiosyncratic as to suggest a cover-up.")

The stringency of this standard creates a paradox under Rule 56. In order to defeat a defendant's motion for summary judgment, a discrimination plaintiff in an individual promotion or hiring case will often have to prove disparities in qualifications so great that no rational employer could have concluded that a competing candidate was more qualified. Evidence of that magnitude would ordinarily be so decisive that no reasonable *jury* could fail to conclude that the employer in question had lied when it asserted that the plaintiff was rejected because of his or her qualifications. But that would mean in many cases that only evidence requiring summary judgment for the plaintiff (or at least partial summary judgment) would be sufficient to prevent summary judgment for the defendant. If that were the law, at least partial summary judgment for one of the parties would ordinarily be unavoidable, and there would often be little if any role for the trier of fact.

A similar paradox is created under Federal Rule 50. Sometimes this stringent standard references a "*no* reasonable juror" test instead of a "*no* reasonable employer" test. Under traditional Rule 50 analysis, a plaintiff need only produce sufficient evidence that *a* reasonable juror could potentially find in favor of a plaintiff to avoid a judgment as a matter of

law. However, *Millbrook* instructs a plaintiff that the only way to defeat a judgment as a matter of law brought by the defendant in a comparative qualification case is for the plaintiff to prove that his case is so strong that *no reasonable juror* could ever conclude against him.

Another line of decisions insists that a plaintiff can rely on evidence of comparative qualifications only if that evidence is so extraordinary that it would "slap [the judges] in the face."

> [U]nless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty. . . .

Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993)[7]. Still other decisions insist that evidence regarding comparative qualifications (when offered by a plaintiff) must be

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7. The slap-in-the-face standard has been quoted or otherwise reiterated in more than a dozen later appellate decisions. *Walker v. Prudential Property and Casualty Ins. Co.*, 286 F.3d 1270, 1277 (11th Cir. 2002); *Bernales*, 2002 WL 1022011 *2; *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001); *Denney v. City of Albany*, 247 F.3d 1172, 1187 (11th Cir. 2001); *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 565 (5th Cir. 2001); *Alexander v. Fulton County, Georgia*, 207 F.3d 1303, 1340 (11th Cir. 2000); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1319 (10th Cir. 1999); *Deines v. Texas Dept. of Protective and Regulatory Services*, 164 F.3d at 280; *Scott v. University of Mississippi*, 148 F.3d 493, 508 (5th Cir. 1998); *Ruiz v. Posadas de San Juan Associates*, 124 F.3d 243, 251 (1st Cir. 1997); *Lehman v. Prudential Insurance Co. of America*, 74 F.3d 323, 329 (1st Cir. 1996); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445 (5th Cir. 1996); *see Odom*, 3 F.3d at 847 (plaintiff's "qualifications [do not] leap from the record and cry out to all who would listen that he was vastly . . . more qualified.")

"overwhelming"[8] or "cry out"[9] or show that the plaintiff was "clearly" better qualified[10]. On the other hand, if a defendant employer offers evidence that the person it selected was better qualified, none of these evidentiary restrictions apply to the defendant.

The avowed purpose of these demanding standards is to assure that "the bar is set high" for plaintiffs seeking to prove discrimination in this manner. *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 357 (1st Cir. 2001). This line of decisions has been uniquely successful in achieving that goal. There are more than sixty lower court decisions endorsing some form of the requirement in *Odom* and its progeny that evidence of disparities in qualifications meet a demanding standard; those cases are set out in Appendix G to this brief. We have been able to identify only a single reported case in which a court found that a plaintiff had succeeded in meeting that standard[11]. Under the decisions from *Odom* to *Millbrook* the scrutiny of comparative evidence offered by discrimination plaintiffs is strict in theory, and fatal in practice.

The courts applying this standard to dismiss discrimination claims have at times acknowledged that the plaintiff in question might well have been more qualified than the individual who was actually awarded the position in question. *E.g.*, *Vargas v. Puerto Rican-American Insurance Co.*, 52 F. Supp. 305, 310 (D. P.R. 1999) ("Even though [the

8. E.g., *Bullington v. United Air Lines, Inc.*, 186 F.3d at 1319.

9. *Price v. Federal Express Corp.*, 283 F.3d 715, 723 (5th Cir. 2002).

10. *E.g.*, *Scott*, 148 F.3d at 508.

11. *Dudley v. Wal-Mart Stores, Inc.*, 931 F. Supp. 773, 805-06 (M.D. Ala. 1996) (claim of plaintiff Easter).

plaintiff in this age discrimination case] may be eminently more qualified than [two younger workers who were promoted instead], that fact by itself is insufficient to create a genuine issue as to whether [the employer's] proffered reason was a pretext.")[12] The differences in qualifications which the courts have deemed without probative value span the spectrum of skills, abilities, and requirements relied on by employers in making promotion and hiring decisions. Thus plaintiffs have been unable to rely on evidence that they had more education[13], more administrative, managerial, or other experience[14], more consistent attendance[15], more

12. *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001) (47-year-old female plaintiff "may even be justified in believing she was more qualified than [33-year-old man who received the disputed promotion]"); *Denney v. City of Albany*, 247 F.3d 1172, 1188 (11th Cir. 2001) ("one perhaps could argue that [plaintiff] was indeed the best candidate on paper"); *Byrnie v. Town of Cromwell Public Schools*, 73 F. Supp. 2d 204, 213 (D. Ct. 1999) ("we must concede that plaintiff had better objective 'paper' credentials"); *Oliver v. United States of America, Department of Defense*, 44 F. Supp. 2d 621, 825 (W.D. Tex. 1999) ("[a]t best the evidence shows that plaintiff was merely better . . . qualified").

13. *Price v. Federal Express Corp.*, 283 F.3d 715, 718, 722 (5th Cir. 2002) (black plaintiff had college degree required in written job specifications; successful white applicant did not); *Scott v. University of Mississippi*, 148 F.3d 493, 508 (5th Cir. 1998) (54-year-old plaintiff in ADEA case had Ph.D., M.A. and law degree; successful 33-year-old applicant had only law degree); *Mustafa v. State of Nebraska Department of Correctional Services*, 196 F. Supp. 2d 945, 953-54 (D. Neb. 2002) (black plaintiff had college degree, successful white applicant did not).

14. *Price v. Federal Express Corp.*, 283 F.3d 715, 722-23 (5th Cir. 2002) (only plaintiff had the 5 years of law enforcement experience required for the job); *Cofield v. Goldkist, Inc.*, 267 F.3d

(Cont'd)

seniority[16], higher test scores[17], better performance evaluations[18], better communication skills[19], and greater technical knowledge[20]. When such differences in qualifications favor the candidate selected by an employer, courts often regard that fact as so conclusive as to require an award of summary judgement to the defendant. But when such differences favor the plaintiff, many circuits dismiss them as devoid of probative significance.

The circuit courts that limit use by plaintiffs of evidence of comparative qualifications are themselves further divided about two issues. First, there is a conflict among these circuits regarding whether the judiciary, or a jury, should decide

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(Cont'd)
1264, 1268 (11th Cir. 2001) (plaintiff had 15 years of managerial experience, successful candidate had less than 8 years); *Denney v. City of Albany*, 247 F.3d 1172, 1187 (11th Cir. 2001) (only plaintiff had supervisory experience); *Alexander v. Fulton County, Georgia*, 207 F.3d 1303, 1341 (11th Cir. 2000) (only plaintiff had administrative experience); *Ellenbogen v. Projection Video Services, Inc.*, 2001 WL 736774 *7-*8 (S.D.N.Y.) (plaintiff's experience "was clearly more extensive"); *Humphrey v. Potter*, 162 F. Supp. 1354, 1362-63 (S.D. Fla. 2001) (plaintiff had two years experience in the position in question; the successful candidate had only "a few weeks").

15. *Humphrey v. Potter*, 162 F. Supp. 2d 1354, 1362 (S.D. Fla. 2001).

16. *Nichols v. Lewis Grocer*, 138 F.3d 563, 568 (5th Cir. 1998); *Daniels v. Home Depot, Inc.*, 2002 WL 1398643 *10 (E.D. La.); *Humphrey v. Potter*, 162 F. Supp. 2d 1354, 1362 (S.D. Fla. 2001).

17. *Denney v. City of Albany*, 247 F.3d 1172, 1187 (11th Cir. 2001).

18. *Denney*, 247 F.3d at 1187.

19. *Odom v. Frank*, 3 F.3d 839, 846 (5th Cir. 1993).

20. *Id.*

whether a plaintiff has met the stringent standard for use of comparative evidence. Some appellate courts decide for themselves whether the differences in qualifications were great enough to be probative[21]; in other circuits the issue is whether a rational jury could find that the applicable standard had been satisfied[22]. Second, in most circuits, as in the Seventh Circuit, comparative qualification evidence which does not meet this standard is devoid of probative value in the Second Circuit, however, such evidence does have some probative value, but it is not sufficient to support a finding of discrimination unless the plaintiff adduces other, more direct evidence of discrimination[23].

The practical effect of these restrictions is to recreate the evidentiary scheme unanimously rejected by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The question in *Reeves* was whether a finding of intentional discrimination can be based on a prima facie case combined with evidence that an employer's proffered

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21. *E.g.*, *Odom v. Frank*, 3 F.3d. 839, 846 (5th Cir. 1993) ("*We find* that neither singly nor collectively do Odom's qualifications leap from the record and cry out to all who would listen that he was vastly — or even clearly — more qualified for the subject job than was Price.") (Emphasis added).

22. *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 3557 (5th Cir. 2001) (question is whether the plaintiffs adduced adequate "evidence that they were 'clearly better qualified' "); *Scott v. University of Mississippi*, 148 F.3d 493, 508 (5th Cir. 1998) ("a plaintiff can take his case to a jury with evidence that he was *clearly better qualified*") (Emphasis in original); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1444 (5th Cir. 1995) ("[a] factfinder can infer pretext if *it* find that the employee was 'clearly better qualified' ") (emphasis added).

23. *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 103 (2d Cir. 2001).

explanation was false. Prior to *Reeves*, a number of lower courts had held that such evidence was insufficient as a matter of law, and that a plaintiff must always adduce as well some form of more direct evidence of discriminatory motive, such as derogatory remarks. *Reeves*, 530 U.S. at 140-41.

Reeves rejected that requirement.

Reeves itself involved a dismissal which a jury had found was based on the plaintiff's age. The employer asserted that it had fired Reeves because of several incidents of misconduct. Reeves in turn "made a substantial showing that [the employer's] explanation was false," 530 U.S. at 144, by offering evidence that he was not guilty of the asserted misconduct, either because the misconduct had not occurred or because that misconduct was the responsibility of others. The court of appeals deemed this evidence inherently insufficient. It insisted that a plaintiff must also offer other, direct evidence of discrimination, and overturned the jury verdict because there had been insufficient "derogatory, age-based comments" directed at Reeves. 530 U.S. at 145.

This Court held that (at least ordinarily) a plaintiff can provide sufficient support for a finding of discrimination by proving that an employer's proffered explanation was false.

> [I]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. . . . [O]nce the employer's justification has been eliminated, discrimination may well be the most likely explanation. . . . Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer discriminated.

530 U.S. at 147-48 (Emphasis in original).

The decision of the court below, and the similar rule in the First, Second, Fifth, Tenth and Eleventh Circuits, resurrects the requirement of direct evidence rejected in *Reeves*. In a promotion or hiring case, "the employer's justification" will almost invariably be that the person actually promoted or hired was better qualified. Ordinarily the most (perhaps only) practicable way a plaintiff could establish "the falsity of the employer's explanation" would be to show, to the contrary, that he or she was in fact better qualified. But in most of these circuits evidence that a plaintiff was the best qualified candidate can virtually *never* establish the falsity of the employer's justification because such evidence as a matter of law has no probative value at all. Where the employer's proffered justification is that it promoted or hired the best candidate, proof of falsity is thus essentially impossible; only direct evidence of discrimination can therefore suffice. That is why the Seventh Circuit in the instant case, just like the Fifth Circuit in *Reeves*, insisted that the plaintiff adduce evidence of relevant derogatory remarks. *Compare Reeves v. Sanderson Plumbing*, 197 F.3d 688, 693 (5th Cir. 1999), *with* App. 26a ("There is absolutely no other evidence of intentional discrimination—not one racist comment, not any harassment"). The rule in the Second Circuit is little different; evidence that a plaintiff was better qualified (and that the proffered justification was thus false) will support a finding of discrimination, but *only* if the plaintiff also adduces additional, direct evidence of discrimination[24]. That, of course, is exactly the requirement that was imposed by the Fifth Circuit in *Reeves* and was rejected by this Court.

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24. *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 103 (2d Cir. 2001).

III. The Probative Significance Of Evidence Of Comparative Qualifications Is A Question Of Great Importance To The Effectiveness Of Federal Anti-discrimination Statutes

The importance of this issue is illustrated by the broad range of anti-discrimination statutes to which the restriction on comparative qualification evidence has been applied: Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, 42 U.S.C. § 1981, Title IX, federal civil rights conspiracy statutes, section 1983 actions to enforce the Fourteenth Amendment, state, city, and Puerto Rican anti-discrimination laws. Within the last eighteen months alone, that restriction has been applied in 30 reported decisions. We set out in Appendix G to this petition a listing of these cases and to the statutes involved.

The legal standards governing the method of proving intentional discrimination go to the very heart of the nation's civil rights laws and to the viability of the Equal Protection Clause. For that reason, this Court has on thirteen occasions granted certiorari to review questions regarding the respective burdens on plaintiffs and defendants in cases of asserted disparate treatment.[25] The reasons for granting review in this case of the limitations on evidence of comparative

25. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); *United States Postal Serv. bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1979); *Furnco Construction Co. v. Waters*, 431 U.S. 567 (1978); *Teamsters v. United States*, 431 U.S. 324 (1977); *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

a standard that in practice can virtually never be satisfied, they create different standards depending on whether the comparative evidence is offered by and favors the plaintiff or the defendant, and they effectively recreate for hiring and promotion cases the direct evidence requirement rejected by this Court in *Reeves*.

These restrictions on the use of comparative qualification evidence pose a conundrum for the United States. These restrictions seriously limit the ability of the EEOC to prove intentional discrimination, and their application was resisted by the Commission in *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438 (5th Cir. 1995). In *Patterson v. McLean Credit Union* the Solicitor General insisted that evidence regarding comparative qualifications is an appropriate method of proving discrimination in a promotion case.

> The fact-finder need only find that the preponderance of the evidence establishes that but for the consideration of her race the plaintiff would not have been denied the promotion she sought. The plaintiff may demonstrate this fact by producing evidence that she was more qualified than the candidate who was actually selected.

Brief for the United States, No. 87-107, p. 25. On the other hand, both the Department of Justice and independent federal agencies have on repeated occasions defended employment discrimination cases by invoking the line of decisions barring use of evidence regarding comparative qualifications[26].

26. *Odom v. Frank*, 3 F.3d 839 (5th Cir. 1993) (case defended by the Office of Labor Law, U.S. Postal Service); *Humphrey v. Potter*, 162 F. Supp. 2d 1354 (S.D. Fla. 2001) (defendant represented by the U.S. Attorney and the Law Department of the U.S. Postal Service); (Cont'd)

Under these circumstances it might be appropriate to invite the Solicitor General to express the views of the United States regarding the questions presented.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ERIC SCHNAPPER
University of Washington
School of Law
1100 N.E. Campus
Parkway
Seattle, WA 98105
(206) 616-3167

JOHN F. DOAK*
KATZ, HUNTOON
& FIEWEGER, P.C.
200 Plaza Office Building
1705 Second Avenue
P.O. Box 3250
Rock Island, IL 61204
(309) 788-5661

Attorneys for Petitioner

* *Counsel of Record*

(Cont'd)

Thomesen v. West, 2001 WL 1636311 (E.D.N.Y.) (action against the secretary of Veterans Affairs); *Haire v. United States*, 101 F. Supp. 2d 478 (N.D. Miss. 2000) (defendant represented by the U.S. Attorney); *Haran v. Summers*, 2000 WL 33348734 (W.D. Tex.) (action against the Secretary of the Treasury); *Oliver v. United States of America, Department of Defense*, 44 F. Supp. 821 (W.D. Tex. 1999) (defendant represented by the U.S. Attorney); *Coblentz v. Glickman*, 1999 WL 8162666 (E.D. La. 1999) (action against the Secretary of Agriculture); *Skinner v. Brown*, 951 F. Supp. 1307 (S.D. Tex. 1996) (defendant represented by the U.S. Attorney).

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED FEBRUARY 20, 2002

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 01-1189

GARY MILLBROOK,

Plaintiff-Appellee,

v.

IBP, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 98-4121 — **Michael M. Mihm**, *Judge.*

Argued September 20, 2001 — Decided February 20, 2002

Before BAUER, MANION, and EVANS, *Circuit Judges.*

MANION, *Circuit Judge.* Gary Millbrook, a janitor at IBP, Incorporated, sued his employer under Title VII and 42 U.S.C. § 1981, alleging that IBP discriminated against him on the basis of his race eight times when it selected other candidates to fill the position of Quality Control Inspector. A jury rejected seven of Millbrook's eight discrimination

claims, but concluded that IBP had discriminated against Millbrook on one occasion. The jury awarded Millbrook $7,500 in pain and suffering, $25,000 in lost wages, and $100,000 in punitive damages. The district court also ordered IBP to instate Millbrook as a Quality Control Inspector and awarded him attorney's fees. Both before and after the jury verdict, IBP moved for judgment as a matter of law. The district court denied both motions. IBP appeals. We reverse.

I.

Gary Millbrook began working as a janitor at IBP's Joslin, Illinois plant in November 1995. IBP is in the meat processing business and is regulated by the United States Department of Agriculture ("USDA"). According to Millbrook, he accepted the janitorial position because he hoped to advance within IBP to the position of Quality Control Inspector, and eventually obtain a position with the USDA.

Quality Control Inspectors at IBP are in charge of inspecting the processing of carcasses and end-products, and assuring that they meet the standards of the USDA, IBP, and the customer. Quality Control Inspectors are also responsible for completing the paperwork required by the USDA. While the position of Quality Control Inspector is sought after, it is also stressful because in policing the product quality, the inspectors must often confront production supervisors. Accordingly, IBP seeks people with strong communication skills.

Appendix A

IBP employs approximately forty Quality Control Inspectors, with about twenty inspectors working the daytime "A Shift" and the other twenty working the nighttime "B Shift." Shift A inspectors report to Quality Control Supervisor Roger Baylor, and B Shift inspectors report to Audrey Jordan. Both Baylor and Jordan were responsible for interviewing candidates when Quality Control Inspector positions became available. During 1996 and 1997, IBP authorized Baylor and Jordan to make the final hiring decision, with instructions to select the best qualified applicant.

In January 1996, Millbrook applied for the position of Quality Control Inspector. IBP selected another candidate for the position. Between 1996 and 1998, Millbrook applied an additional nine times for the position of Quality Control Inspector, but on each occasion IBP selected another applicant. On November 30, 1998, Millbrook sued IBP for race discrimination under Title VII and Section 1981, alleging that IBP discriminated against him on eight of the ten occasions that he applied for, and was denied, the Quality Control Inspector position; Millbrook admits that on the other two occasions, the other applicants were better qualified.

Millbrook's case was tried before a jury. At trial, Millbrook presented evidence concerning the qualifications of the eight applicants selected over him for the position of Quality Control Inspector. Millbrook argued that he had better qualifications than all of the other applicants, but that IBP chose the other applicants over him because he is black. IBP argued in response that on each occasion that Millbrook applied for the position of Quality Control Inspector, another

applicant was better qualified, and that it always selected the best qualified candidate to fill the vacancy.

At the close of evidence, IBP moved for judgment as a matter of law, but the district court denied its motion, sending the case to the jury. On a verdict form with specific interrogatories, the jury rejected seven of Millbrook's eight claims of race discrimination, but concluded that IBP had discriminated against Millbrook on the basis of race when it selected DeWayne Harris over him in June 1997. The jury awarded Millbrook $7,500 in pain and suffering, $25,000 in lost wages, and $100,000 in punitive damages. After the jury verdict was returned, IBP again moved for judgment as a matter of law, but the district court denied that motion as well. Millbrook then moved for attorney's fees, and for a court order directing IBP to instate him as a Quality Control Inspector. The district court granted Millbrook attorney's fees and also ordered IBP to fill the next Quality Control Inspector vacancy with Millbrook.

IBP appeals, arguing that it was entitled to judgment as a matter of law because Millbrook failed to present sufficient evidence to support a verdict of race discrimination. Alternatively, IBP argues that Millbrook failed to establish a right to punitive damages. IBP also argues that the district court erred in ordering Millbrook instated as the next Quality Control Inspector.

Appendix A

II.

On appeal, IBP first argues that the district court erred in denying its motion for judgment as a matter of law. *See* Fed.R.Civ.P. 50(a). We review the denial of this motion *de novo*, examining the record as a whole to determine whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, was sufficient to support the jury's verdict of race discrimination. *Collins v. Kibort*, 143 F.3d 331, 335 (7th Cir. 1998). While "[w]e will overturn a jury verdict for the plaintiff only if we conclude that no rational jury could have found for the plaintiff," *id.*, "a mere scintilla of supporting evidence will not suffice." *Futrell v. J.I. Case*, 38 F.3d 342, 346 (7th Cir. 1994).

Initially, we stress that the only issue on appeal is IBP's selection of Harris over Millbrook in June 1997. While Millbrook applied a total of ten times for the position of Quality Control Inspector, and while he sued alleging race discrimination on eight of those ten occasions, the jury rejected all of Millbrook's claims except for the one based on IBP's selection of Harris. Millbrook does not appeal the jury's verdict in favor of IBP on the other seven counts. Therefore, the sole issue on appeal is whether sufficient evidence supports the jury's finding that IBP discriminated against Millbrook on the basis of race when it hired Harris over him.

Before reviewing the evidence, we also pause to clarify what "sufficiency of the evidence" means following a trial in a discrimination case. On appeal, both parties frame the issue as whether sufficient evidence supported a finding that

IBP's asserted reason for selecting Harris over Millbrook — his superior qualifications — was pretextual under the *McDonnell Douglas* burden-shifting framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The indirect burden-shifting approach of *McDonnell Douglas* is one method of proving discrimination, and since Millbrook does not purport to have direct evidence of race discrimination, it is the only method at his disposal. Under this method, a Title VII plaintiff must establish a prima facie case of unlawful discrimination. "This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications," *id.* at 802, or that "the position was filled with a person not in the protected class." *Gorence v. Eagle Food Centers, Inc.*, 242 F.3d 759, 765 (7th Cir. 2001). After the plaintiff has established a prima facie case, an inference of discrimination exists. The burden of production then shifts to the defendant-employer to produce evidence of a legitimate, nondiscriminatory reason for its employment decision. *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 629 (7th Cir. 1996). "Once this burden of production is met, any inference of discrimination evaporates. To prove unlawful discrimination at this stage, the plaintiff must demonstrate to the jury that the reason proffered by the employer was mere pretext, an explanation designed to obscure the unlawful discriminatory employment action." *Id.*

In this case, both parties agree that Millbrook presented a prima facie case of race discrimination, and that IBP responded with a legitimate nondiscriminatory explanation for its selection of Harris. Therefore, on appeal the parties focus on the issue of pretext. However, once a trial is complete and judgment rendered, the burden-shifting framework of *McDonnell Douglas* falls away: "Post-trial we consider only whether the record supports the resolution of the ultimate question of intentional discrimination." *Collins*, 143 F.3d at 335. Accordingly, the appropriate question on appeal is not whether IBP's proffered reason for rejecting Millbrook's application was pretextual, but rather whether sufficient evidence supports the jury's finding that IBP discriminated against Millbrook because he is black. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000) ("The ultimate question is whether the employer intentionally discriminated, . . .").

The question of pretext, however, can still be relevant. As the Supreme Court explained in *Reeves*, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148. In other words, if the plaintiff proves at trial that the defendant's proffered reason for its employment decision was false, i.e., pretextual, that is "one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* But "[i]t is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Id.* Thus, as the Supreme Court in *Reeves* stressed, the existence of the prima facie case,

coupled with evidence of pretext, is not always enough to satisfy the plaintiff's burden of proving intentional discrimination. *Id.* at 146-47 ("This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory.").

Applying *Reeves*, we must first consider whether Millbrook presented sufficient evidence of pretext — not because that is dispositive, but because if IBP's asserted justification for selecting Harris were pretextual, that could constitute circumstantial evidence that IBP intentionally discriminated against Millbrook. From there, we review the record as a whole to determine whether the evidence in its entirety supports a reasonable inference of race discrimination. *Id.* at 148.

Pretext "means a lie, specifically a phony reason for some action." *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995). The question is not whether the employer properly evaluated the competing applicants, but whether the employer's reason for choosing one candidate over the other was honest. *Brill v. Lante Corp.*, 119 F.3d 1266, 1273 (7th Cir. 1997). " 'Pretext for discrimination' means more than an unusual act; it means something worse than a business error; 'pretext' means deceit used to cover one's tracks." *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1005 (7th Cir. 2001) (internal citations omitted). Thus, even if IBP's reasons for selecting Harris over Millbrook were "mistaken, ill

considered or foolish, so long as [the employer] honestly believed those reasons, pretext has not been shown." *Jordan v. Summers*, 205 F.3d 337, 343 (7th Cir. 2000).

In this case, IBP stated that it selected Harris over Millbrook because Harris was more qualified, while Millbrook argues that this explanation was a lie. First, Millbrook contends that the jury could reasonably conclude that IBP lied about its reason for selecting Harris because IBP provided a different explanation at trial than it did during the interview process. To support this argument, Millbrook points to the comment section of the Applicant Flow Log, which the B Shift Manager, Audrey Jordan, compiled when she interviewed Harris. On the Applicant Flow Log, Jordan noted that Harris had prior experience. This, according to Millbrook, contradicted IBP's proffered trial rationale — that Harris was more qualified. But the Applicant Flow Log does not purport to be IBP's explanation of its hiring decision; rather, the Flow Logs consist of interview notes which the managers used to record their impressions during the interviews. Moreover, contrary to Millbrook's position, there is nothing inconsistent in IBP's trial position. At trial, IBP explained that it selected Harris because he was more qualified for the position, and it then explained why it believed Harris to be better qualified — because Harris had prior experience in quality control, possessed superior communication skills, and conveyed a confident demeanor. She further explained that these attributes would allow Harris to handle the pressures of confronting production supervisors. Rather than contradict the trial testimony, the Application Flow Log actually confirms IBP's assertion that it believed Harris to be more qualified.

Next, Millbrook points out that IBP hired Harris over him even though Harris did not submit a resume, whereas IBP rejected numerous other candidates who failed to submit a resume. On appeal, IBP explains that it only required internal applicants to submit resumes; candidates who did not work at IBP were required to complete a more extensive application form. Because Harris was not a current IBP employee, he needed to submit a detailed application, but no resume was required. However, as a current employee, Millbrook was required to submit only a resume. The evidence at trial confirms that the applicants whom IBP rejected for failing to submit a resume were current employees, thus verifying IBP's explanation of what appeared to be disparate treatment. Therefore, contrary to Millbrook's position, the fact that IBP required him to submit a resume, but not Harris, is not evidence of pretext.

Millbrook next claims that "negative subjective comments regarding other African-American applicants" made by Audrey Jordan and Roger Baylor on the Application Flow Logs demonstrate their racial bias. Specifically, Millbrook points to interview notes such as "shows no real interest," "no skills experience pertaining to this position," "gave poor and incomplete answers to questions," and "lacks ability to answer questions clearly."

Initially, we note that "nothing in Title VII bans outright the use of subjective evaluation criteria." *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1170 (7th Cir. 1998). S*ee also, Denney v. City of Albany*, 247 F.3d 1172, 1186 (11th Cir. 2001) ("It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability

to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation.") (internal quotation omitted). Rather, "[a] subjective reason can constitute a legally sufficient, legitimate, nondiscriminatory reason under the *McDonnell Douglas/Burdine* analysis." *Denney*, 247 F.3d at 1185 (internal quotation omitted). In fact, "subjective evaluations of a job candidate are often critical to the decisionmaking process, and if anything, are becoming more so in our increasingly service-oriented economy. . . ." *Id.* at 1185-86 (internal quotations omitted). Thus, "[a]bsent evidence that subjective hiring criteria were used as a mask for discrimination, the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext under Title VII. . . ." *Id.* at 1185. *See also, Weihaupt v. American Medical Ass'n*, 874 F.2d 419, 429 (7th Cir. 1989) (the mere fact that an employer's beliefs were based on subjective factors fails to establish that its assessment of employee's skills was made in bad faith); *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1427 (7th Cir. 1986) (a "subjective qualification assessment does not convert an otherwise legitimate reason into an illegitimate one").

In this case, there is absolutely no evidence that the subjective criteria IBP considered in evaluating Millbrook and other candidates served as a "mask for discrimination." The subjective interview comments Millbrook points to, while negative, were all race-neutral. Additionally, at trial, IBP provided specific facts supporting its subjective evaluation of Millbrook. For instance, Jordan explained that she concluded that Millbrook had poor communication skills

because he failed to make eye contract during the interview and did not seem confident in his answers. Moreover, similar comments were made of white and other non-black applicants, negating any possible inference that the comments were codes for race. Therefore, contrary to Millbrook's position, the negative comments do not create an inference of pretext, but instead merely indicate that the candidates were lacking traits needed for the job, which explains why they were not selected by IBP. *See, e.g., Sattar*, 138 F.3d at 1170.

Next, Millbrook argues that the fact that during 1996 and 1997 Audrey Jordan (the supervisor who selected Harris instead of him) did not hire any blacks as Quality Control Inspectors creates an inference of pretext. However, while Millbrook focuses on 1996 and 1997, his discrimination claims are based on the years of 1996-1998, and the record demonstrates that during 1998, Jordan offered a position to a black candidate. In any event, absent a "link between this alleged discrimination and the employment decisions which [the plaintiff] is challenging, this evidence does not assist the plaintiff." *Sample v. Aldi, Inc.*, 61 F.3d 544, 551 (7th Cir. 1995). Moreover, the fact that no blacks were hired during a two-year time frame is at best anecdotal, and we have held that we "cannot find discrimination on such a thin basis." *Kuhn v. Ball State Univ.*, 78 F.3d 330, 332 (7th Cir. 1996). Rather, "[o]ur opinions emphasize the need to get beyond a few comparison cases." *Id.* Instead, "[w]hat a plaintiff in [Millbrook's] position has to do is subject all of the employer's decisions to statistical analysis to find out whether [race] makes a difference." *Kuhn*, 78 F.3d at 332. Millbrook did not present a statistical analysis — he merely pointed to

the fact that he and another black candidate were rejected, and that no other blacks were hired in a two-year time frame. Without knowing how many of the forty Quality Control Inspector positions became available during that time frame, the number and race of the candidates applying for those positions, and the candidates' relative qualifications, "[s]uch a list is next to worthless." *Id. See also, Odom v. Frank*, 3 F.3d 839, 849 (5th Cir. 1993) (raw data of age, race and location of persons promoted from 1980-1993, "without more, is not competent to prove anything"). Under these circumstances, the fact that during a two-year time frame no blacks were hired to fill an unknown number of vacancies fails to create a reasonable inference that IBP was lying when it explained that it hired Harris over Millbrook because it believed Harris to be better qualified.

Finally, Millbrook argues that the jury was allowed to view his qualifications compared to Harris and "could easily have concluded that Mr. Millbrook's college education, significant management experience, experience in the industry, prior communication skills through his job with Black Hawk College, his exemplary personnel record and general qualifications made him more qualified than Mr. Harris." IBP responds that while Millbrook had a college degree, it was in an unrelated area — education — whereas Harris had completed some relevant college courses, including relevant quality control management course work. IBP further points out that while Millbrook worked at IBP, his experience as a janitor (and even as a janitor supervisor at Black Hawk College) was irrelevant to the position of Quality Control Inspector. IBP also points out that while Millbrook worked for another meat packaging company, he

only worked there for nine months, and his job did not include quality control responsibilities. Additionally, that job dated back to the 60's — long before new USDA standards were implemented. Harris on the other hand had prior — and more recent — work experience in quality control, and had leadership skills from serving as a sergeant in the Air Force and acting as a platoon leader. Finally, IBP contends that Millbrook's communication skills were lacking and given the confrontational nature of the Quality Control Inspector position, it was essential that applicants possess superior communications skills. Harris had those skills, as demonstrated by his Communicator of the Year award from the Air Force in 1995.

What we have here then are two qualified applicants with varying credentials, and different views as to which candidate is best for the job. Millbrook argues that when an employer asserts that it chose another applicant over the plaintiff because the selected candidate was more qualified, the jury may return a verdict of discrimination if, after reviewing the applicants' relative qualifications, it simply does not believe the employer's assertion.

In support of his position, Millbrook cites *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627 (7th Cir. 1996), and *Bell v. Environmental Protection Agency*, 232 F.3d 546 (7th Cir. 2000). At first blush, language in both *Emmel* and *Bell* appears to give some support to Millbrook's position. *Emmel*, 95 F.3d at 633 ("Emmel's indirect case is built on the evidence that she was more qualified than at least some of those men promoted," and while Coca-Cola presented a legitimate non-discriminatory explanation,

"the jury did not have to believe it."); *Bell*, 232 F.3d at 551 ("The EPA cannot escape scrutiny merely by claiming that they selected the most qualified candidates," and a fact-finder "could reasonably find that the EPA was dishonest when it concluded that the selectees were more qualified for the promotions than the plaintiffs were.").

However, in both of those cases there was evidence of discrimination in addition to the differences in relative qualifications. For instance, in Emmel, in addition to the evidence of the candidates' relative qualifications, the plaintiff presented direct evidence of discrimination, including testimony that after she was passed over for the promotions, Coca-Cola Vice President John Walsh took her aside, stating "Let's close the door and speak honestly. Karen, you know, as we all know, they wanted men in these positions. . . ." *Emmel*, 95 F.3d at 630. Emmel presented further direct evidence including other statements from top officers that " 'they' believed women had no role in upper management.' " *Id.* at 632. Emmel also presented evidence calling into question Coca-Cola's proffered trial explanation for its employment decision, namely its failure to provide an explanation — other than the obviously impermissible one that "they wanted men in these position" — and that it was not until trial that Coca-Cola justified its decision with a nondiscriminatory reason. *Id.* at 634-35. Likewise, in *Bell*, the plaintiff presented evidence in the form of "an internal EPA document [which] suggests that the EPA did not select the best candidates." *Bell*, 232 F.3d at 551. Bell also presented statistical evidence supporting the plaintiff's claim of discrimination.[1]

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1. Similarly, in *Perdomo v. Browner*, 67 F.3d 140 (7th Cir. 1995), upon which *Bell* relied, while this court noted that a (Cont'd)

In sum, in both *Emmel* and *Bell* the plaintiffs presented evidence of discrimination beyond the relative qualifications of the candidates. *See Emmel*, 95 F.3d at 635; *Bell*, 232 F.3d at 554. However, absent such additional evidence of discrimination, this court has held that a jury verdict for the employee cannot stand if the jury is simply disagreeing with the company as to who is best qualified.

For instance, in *Lindale v. Tokheim Corp.*, 145 F.3d 953 (7th Cir. 1998), the plaintiff sought to sustain the jury's verdict of sex discrimination based on her comparative qualifications. We reversed the district court's denial of the employer's motion for judgment as a matter of law, holding that "[t]he comparison evidence is so weak in the circumstances that it cannot *by itself* support an inference of discrimination — and there is virtually nothing else." *Id.* at 957 (emphasis added).

Likewise, in *Guerrero v. Ashcroft*, 253 F.3d 309 (7th Cir. 2001), the plaintiff sought to prove pretext based on a comparison of the candidates' qualifications. In that case, Antonio Guerrero, an Hispanic FBI agent, sued the Attorney General under Title VII for race and national origin discrimination after he was denied a promotion to a GS-14 level of one of the FBI's Organized Crime Squads. *Id.* at 311. The FBI claimed that it selected another candidate

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(Cont'd)
fact-finder could weigh and balance the plaintiff's credentials and qualifications against those of the selected candidate to determine whether the employer's claim that it hired the best candidate was pretextual, that case also involved additional evidence of discrimination. *Id.* at 146.

over Guerrero because of deficiencies in Guerrero's background as compared to the agent who received the promotion. *Id.* at 314-15. The district court granted the FBI summary judgment, concluding that Guerrero had failed to present sufficient evidence of pretext. Guerrero appealed, arguing "that pretext becomes evident when one compares his skill ratings to those of other agents. Guerrero contends that he had comparable, and in some areas, notably drug investigation, more extensive and recent experience than other agents, yet was rated lower." *Id.* at 314. This court rejected Guerrero's invitation to reevaluate his credentials, stating that "[w]e cannot second-guess the appropriateness of this business judgment," and holding that "we find no evidence of pretext in them." *Id.* at 314-15. Accordingly, we affirmed the grant of summary judgment.[2] *Id.* at 315.

On the surface there appears to be some tension between the holdings of *Lindale* and *Guerrero*, and those of *Emmel* and *Bell*. But there is a clear distinction. In *Emmel* and *Bell* there was additional evidence of discrimination, whereas in *Lindale* and *Guerrero* the plaintiff's case consisted solely of the competing candidates' comparative qualifications. Perhaps because the facts did not require it, neither *Lindale* nor *Guerrero* on the one hand, nor *Emmel* nor *Bell* on the other, pointed out that distinction. In fact, these two lines of cases appear to have developed independently, leaving unanswered in this circuit the question as to when evidence of comparative qualifications constitutes sufficient evidence

2. While *Guerrero* involved a grant of summary judgment, as opposed to judgment as a matter of law, that distinction is irrelevant because the standards mirror each other. *Reeves*, 530 U.S. at 150.

to support a jury verdict of discrimination. We thus look to our sister circuits for guidance.

The Fifth Circuit in *Deines v. Texas Dept. of Protective and Regulatory Services*, 164 F.3d 277 (5th Cir. 1999), reiterated that circuit's general rule that "differences in qualifications between job candidates are generally not probative evidence of discrimination unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." *Id.* at 279. The court specifically held that the district court did not err when instructing the jury that "disparities in qualifications are not enough in and of themselves to demonstrate discriminatory intent unless those disparities are so apparent as to virtually 'jump off the page and slap you in the face.' " *Id.* The court further explained that

> apart from searching for discriminatory intent, it is not the function of the jury to scrutinize the employer's judgment as to who is best qualified to fill the position; nor is it the jury's task to weigh the respective qualifications of the applicants. Whether the employer's decision was the correct one, or the fair one, or the best one is not a question within the jury's province to decide. The single issue for the trier of fact is whether the employer's selection of a particular applicant over the plaintiff was motivated by discrimination.

Id. See also, Celestine v. Petroleos de Venezuella SA, 266 F.3d 343, 356-57 (5th Cir. 2001); *Scott v. University of*

Mississippi, 148 F.3d 493, 508 (5th Cir. 1998); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445 (5th Cir. 1995); *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993).

The Second, Tenth, Eleventh, and D.C. Circuits have followed the Fifth Circuit's lead. For instance, in *Byrnie v. Town of Cromwell*, 243 F.3d 93, 103 (2d Cir. 2001), the Second Circuit held that "when a plaintiff seeks to prevent summary judgment on the strength of a discrepancy in qualifications, . . . [i]n effect, the plaintiff's credentials would have to be so superior to the credentials of the person selected for the job that 'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.' " *Id.* at 103 (quoting *Deines*, 164 F.3d at 280-81). Similarly, in *Lee v. GTE Florida, Inc.*, 226 F.3d 1249 (11th Cir. 2000), the Eleventh Circuit held that the "evidence [was] insufficient to raise a genuine issue of fact regarding whether [the employer's] stated reason for promoting [the other candidate] instead of [the plaintiff] is pretextual. None of [plaintiff's] proffered evidence established that she was more qualified than [the other candidate], let alone so clearly more qualified for the position than [plaintiff] that a reasonable juror could infer discriminatory intent from the comparison." *Id.* at 1255. *See also*, *Denney v. City of Albany*, 247 F.3d 1172, 1187 (11th Cir. 2001) ("Our precedent, however, requires a strong showing of a disparity in qualifications in order for an inference of discrimination to arise."); *Alexander v. Fulton County*, 207 F.3d 1303, 1339 (11th Cir. 2000) ("In a failure to promote case, however, a plaintiff cannot prove pretext by simply arguing or even by showing that he was better

qualified than the officer who received the position he coveted."). Likewise, in *Simms v. Oklahoma ex rel. Department of Mental Health and Substance Abuse Services*, 165 F.3d 1321 (10th Cir. 1999), the Tenth Circuit held that "[w]hen two candidates are equally qualified in that they both possess the objective qualifications for the position and neither is clearly better qualified, it is within the employer's discretion to choose among them so long as the decision is not based on unlawful criteria." *Id.* at 1330. The D.C. Circuit adopted a similar standard in *Fischbach v. District of Columbia Department of Corrections*, 86 F.3d 1180 (D.C. Cir. 1996): "Evidence indicating that an employer misjudged an employee's performance or qualifications is, of course, relevant to the question whether its stated reason is a pretext masking prohibited discrimination, if the employer made an error too obvious to be unintentional, perhaps it had an unlawful motive for doing so." *Id.* at 1183 (internal citation omitted).

This standard — first set forth by the Fifth Circuit, and since followed by four other circuits — is appropriate. Accordingly, we now hold that where an employer's proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants' competing qualifications does not constitute evidence of pretext "unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." *Deines*, 164 F.3d at 279. In other words, "[i]n effect, the plaintiff's credentials would have to be so superior to the credentials of the person selected for the job that 'no reasonable person, in the exercise

of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.' " *Byrnie*, 243 F.3d at 103 (quoting *Deines*, 164 F.3d at 280-81). This makes sense because a court's "role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second-guesses employers' business judgments." *Simms*, 165 F.3d at 1330. As we have stated, "[n]o matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, [Title VII] does not interfere." *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988) (internal quotation omitted). Rather, this "court must respect the employer's unfettered discretion to choose among qualified candidates." *Fischbach*, 86 F.3d at 1183. If we were to allow a jury to evaluate competing credentials to determine whether the employer's assertion that it selected the best candidate was pretextual, the jury would in most cases be replacing the employer's personnel department. Yet neither the judge nor the jury is "as well suited by training and experience to evaluate qualifications for high level promotion in other disciplines as are those persons who have trained and worked for years in that field of endeavor for which the applications under consideration are being evaluated." *Odom*, 3 F.3d at 847.

This standard is also consistent with our frequent admonitions "that a plaintiff's own opinions about her work performance or qualifications do not sufficiently cast doubt on the legitimacy of her employer's proffered reasons for its employment actions." *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996). Similarly, we have held that mere "submission of materials from a

co-worker or supervisor indicating that an employee's performance is satisfactory does not . . . create a material issue of fact." *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1125 (7th Cir. 1994). A plaintiff's contention that he is the better candidate for a vacancy constitutes nothing but the employee's own opinion as to his qualifications. This cannot create an issue of material fact because "[a]n employee's perception of his own performance . . . cannot tell a reasonable factfinder something about what the employer believed about the employee's abilities." *Olsen v. Marshall & Ilsley Corp.*, 267 F.3d 597, 602 (7th Cir. 2001). "And without proof of a lie [as to what the employer believed] no inference of discriminatory motive can be drawn." *Id.*

Finally, this standard is consistent with the plaintiff's ultimate burden of proof in discrimination cases. Such a plaintiff cannot get to a "jury if his only 'evidence' had been that defendants' witnesses were not worthy of belief. That would have made it a no-evidence case, and such a case a plaintiff must lose, because he has the burden of proof." *Equal Employment Opportunity Commission v. G-K-G, Inc.*, 39 F.3d 740, 746 (7th Cir. 1994) (internal citations omitted). Rather, "to avoid a directed verdict or a JNOV, a plaintiff must do more than merely argue that the jury might have chosen to disbelieve all of the defendant's evidence. . . . A plaintiff must offer substantial evidence to support the argument." *Perfetti v. First National Bank of Chicago*, 950 F.2d 449, 456 (7th Cir. 1991) (internal quotations omitted). Thus, "[a] party cannot meet its burden of proof 'by relying on the hope that the jury will not trust the credibility of the witnesses. . . .' " *Id.* (internal citation omitted). Yet that is exactly what Millbrook attempts; he seeks to justify the jury

verdict based on his contention that the jury could have disbelieved IBP's assertion that it selected Harris because of his superior qualifications. However, without some affirmative evidence calling into question IBP's credibility, Millbrook must lose. *See also*, *Fischbach*, 86 F.3d at 1183 ("Title VII liability cannot rest solely upon a judge's determination that an employer misjudged the relative qualifications of admittedly qualified candidates."). Thus, to reconcile this precedent, we must adopt the standard that we have today — that comparative qualifications do not support a finding of pretext — or we would be allowing plaintiffs to reach the jury based solely on a claim that the employer cannot be believed. We have consistently rejected such claims. *See, e.g.*, *Massey v. Blue Cross-Blue Shield of Illinois*, 226 F.3d 922, 926 (7th Cir. 2000) ("It is always possible, of course, that the jury might have disbelieved everything [the employer] said, but we routinely deny summary judgments based on that kind of hope, and consistency requires us also to reject that possibility as a way of saving the jury's verdict.").

Applying this standard to the facts at hand, we note initially that it is a close question as to whether Millbrook's qualifications are equivalent to or exceed those of Harris. While Millbrook had a college education, his degree was in an unrelated field, education, and Harris had completed some college course work in the relevant area of management. Harris also had experience in quality control, whereas Millbrook did not. Harris' tour of duty with the military is also a credential highly valued by many employers because of the discipline, respect, work ethic, and many other valuable virtues military service instills. And, during his time with

the Air Force, Harris demonstrated his communication skills, as documented by his Communicator of the Year Award. IBP explained that it sought out candidates with such qualifications because Quality Control Inspectors must possess superior communication skills given the confrontational nature of the position. But, even assuming that Millbrook was better qualified than Harris, his credentials were not clearly superior, and therefore a reasonable employer could have concluded that Harris was the better person for the job. Accordingly, a comparison of the relative qualifications of Millbrook and Harris is by itself not probative of pretext.[3]

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3. *See, e.g.*, *Byrnie*, 243 F.3d at 102-03 (while plaintiff's paper credentials were superior to the chosen candidate's, plaintiff's credentials were not so superior such that no reasonable employer could have selected the candidate it did); *Lee*, 226 F.3d at 1255 ("Since [plaintiff's] evidence at trial fell far short of establishing that she was clearly more qualified for the position than [the selected candidate, the plaintiff] did not meet her burden of establishing that [the employer's] proffered reason for denying her the promotion was a pretext for gender discrimination."); *Denney*, 247 F.3d at 1187 ("Not only do Plaintiffs fail to acknowledge this case law, which makes clear that they ultimately must do more to show pretext than prove that they were better qualified than [the selected candidates], but they also fail to make a persuasive showing that they are, in fact, better qualified."); *Celestine*, 266 F.3d at 357 ("A review of the briefs and record excerpts reveals that none of the [plaintiffs] presented competent summary judgment evidence that they were 'clearly better qualified' for promotion or training. They therefore failed to even attempt to rebut [the employer's] proffered non-discriminatory explanation, making the grant of summary judgment to [the employer] proper."); *Odom*, 3 F.3d at 846-47 (district court's finding that plaintiff was "clearly better qualified" for position constituted clear error); *Scott*, 148 F.3d at 509 ("In sum, we conclude that [the plaintiff's] qualifications are not 'so superior' to those of [the chosen candidate] to allow an inference of pretext.") (internal quotation omitted).

In sum, none of the evidence Millbrook cites as evidence of pretext supports a reasonable inference that IBP lied when it explained its rationale for selecting Harris — his superior qualifications.[4] While Millbrook believes the jury should be allowed to review the candidates' relative qualifications to decide whether or not IBP lied, without any evidence calling into question IBP's veracity, what this case really comes down to is the jury deciding which applicant is more qualified. But believing or not believing the decisionmaker is simply saying that the employer made the wrong choice — which is not illegal. Because there is no evidence of pretext, Millbrook has failed to create an inference that IBP intentionally discriminated against him by hiring Harris.

Moreover, even if we were to assume that the above evidence constituted evidence of pretext, under *Reeves*, that would not end the inquiry. As *Reeves* made clear, the existence of the prima facie case, coupled with evidence of pretext, is not always enough to satisfy the plaintiff's burden of proving intentional discrimination. Rather, "an employer would be entitled to judgment as a matter of law . . . if the plaintiff created only a weak issue of fact as to whether the

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4. While Millbrook asserted four other evidential theories of pretext beyond Harris and his relative qualifications, as discussed above, that evidence failed to create a reasonable inference that IBP lied when it explained why it hired Harris. *See supra* at 1175-77. Adding those four pieces of evidence with the comparative qualification evidence does nothing for Millbrook because the sum of many nothings is nothing. *See Holmberg v. Baxter Healthcare Corp.*, 901 F.2d 1387, 1391 (7th Cir.1990) ("[T]he sum of four nondiscriminatory episodes does not support [a] case any more than viewing the four episodes separately.").

employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148.

In this case, assuming that Millbrook presented evidence of pretext, at best he "created only a weak issue of fact as to whether the employer's reason was untrue." *Id.* There is absolutely no other evidence of intentional discrimination — not one racist comment, nor any harassment. Millbrook admitted at trial that no one at IBP made any comments indicating that race played a factor in its selection of Quality Control Inspectors. In fact, of the 443 pages of trial transcript, less than five full pages focused on the selection of Harris over Millbrook. In short, Millbrook has no proof that IBP denied him a promotion because of his race. The case he presented is simply not enough under *Reeves* to sustain a jury verdict in his favor, even if some evidence of pretext had existed.

In a final attempt to salvage a victory, Millbrook points out that IBP has a "Herculean burden" to overcome a jury verdict. *Gile v. United Airlines, Inc.*, 213 F.3d 365, 372 (7th Cir. 2000). While it is true that it is difficult to set aside a jury verdict, our review of the evidence is not a rubber stamp of a jury's decision. Notwithstanding this standard of mythical proportions, we have overturned jury verdicts in discrimination cases very similar to the case at hand.

For instance, in *Shank v. Kelly-Springfield Tire Company*, 128 F.3d 474 (7th Cir. 1997), a jury returned a verdict of age discrimination in favor of Robert Shank, who sued his former employer, Kelly-Springfield Tire Company, after he was fired.

Kelly-Springfield maintained that it had fired Shank because Shank had filed a fraudulent claim for a refund in violation of company policy. A jury, however, rejected that explanation. Kelly-Springfield then moved for judgment as a matter of law, but the district court denied that motion. On appeal, this court reversed, concluding that Shank failed to present sufficient evidence of age discrimination to support the jury's verdict.

Shank, like Millbrook, argued that the jury could have inferred that Kelly-Springfield fired him because of his age if it disbelieved the company's proffered explanation for its employment decision. *Id.* at 478. However, after reviewing the evidence in its entirety, we concluded that none of the evidence Shank presented to demonstrate pretext called into question the veracity of the company's explanation. *Id.* at 480. While Shank argued that the jury could have inferred that Kelly-Springfield had lied about its reason for firing Shank, we concluded that without some evidence supporting that inference, a jury verdict could not stand. Accordingly, we held that Kelly-Springfield was entitled to judgment as a matter of law. *Id.* Similarly, in this case, without any evidence that IBP lied about its reason for selecting Harris and without any other evidence of discrimination, IBP was entitled to judgment as a matter of law.

Shank is just one of the many cases where we have overturned a jury verdict because of insufficient evidence, demonstrating that the Herculean burden of which we spoke does not protect plaintiffs lacking in evidence. *Shank*, 128 F.3d 474. *See also*, *Aungst v. Westinghouse Electric Corp.*, 937 F.2d 1216 (7th Cir. 1991) (affirming district court's

decision granting defendant judgment as a matter of law because plaintiff failed to present sufficient evidence of pretext to sustain jury verdict of age discrimination); *Massey v. Blue Cross-Blue Shield of Illinois*, 226 F.3d 922 (7th Cir. 2000) (district court properly granted defendant judgment as a matter of law because plaintiff failed to present sufficient evidence that employer's legitimate nondiscriminatory reasons for her discharge — her poor writing skills and inability to investigate and follow through — were pretextual).[5] As in these cases, Millbrook failed to present sufficient evidence of intentional discrimination, and therefore the jury verdict cannot stand.

III.

Hiring decisions are often difficult and sometimes require companies to make close calls, but those decisions are for the employer to make — not the court and not the jury — unless there is evidence of illegal discrimination. In this case, Millbrook presented absolutely no direct evidence of race discrimination, and while he attempted to rely on an inference of discrimination by challenging IBP's explanation for its selection of Harris, he failed to present any evidence calling into question the veracity of IBP's explanation. While Millbrook may believe he was more qualified than

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5. *Cf.*, *Rand v. CF Indust. Inc.*, 42 F.3d 1139 (7th Cir. 1994) (defendant-employer entitled to summary judgment because plaintiffs failed to present sufficient evidence of pretext); *Olsen v. Marshall & Ilsley Corp.*, 267 F.3d 597 (7th Cir. 2001) (accord); *Kuhn v. Ball State University*, 78 F.3d 330 (7th Cir. 1996) (accord); *Jordan v. Summers*, 205 F.3d 337 (7th Cir. 2000) (accord).

Harris (indeed, even if he were arguably the better choice), Title VII is not a merit selection program. Absent evidence that no reasonable employer could believe that it selected the best candidate, we will defer to the employer's decision. Because Millbrook was not clearly more qualified than Harris, their relative qualifications cannot serve as a basis for sustaining the jury's verdict. Rather, we are left with a case where there is no evidence of intentional race discrimination, and therefore IBP was entitled to judgment as a matter of law. Because IBP was entitled to judgment as a matter of law, Millbrook was not entitled to any damages, much less punitive damages, and the award of attorney's fees, costs, and instatement also cannot stand. Accordingly, we REVERSE.

Appendix A

EVANS, *Circuit Judge*, dissenting. I respectfully dissent. A jury listened to evidence of eight instances in which Millbrook failed to receive a promotion. He claimed the rejections were because of his race; the company contended that in each instance the candidate promoted was better qualified. A properly instructed jury looked at this evidence and concluded, apparently, that in seven of the cases Millbrook had not met his burden of proof; the person promoted could be seen as better qualified. In the eighth, the jury found that discrimination was afoot. In this appeal of that verdict, the issue, according to the majority, is whether Millbrook was so notably better qualified than Harris that, *absent other evidence*, the choice to hire Harris over promoting Millbrook must have been discriminatory.

Discrimination today is rarely overt. Sometimes it works underground. It is often very subtle. In today's environment, it is unfair to require plaintiffs to produce smoking guns. So, in a case like this, how much additional evidence are we going to require to bolster the claim of a marginally better, or at least equally qualified, plaintiff who claims discrimination stopped him from getting a promotion? And here, I question whether it is fair to say that, in fact, there was an absence of other evidence. The jury had a broad view of the company's actions as it related to eight employment decisions, not just one. It had evidence, for instance, that no African-Americans were hired in relevant positions in a 2-year period during 1996 and 1997. I believe that there was sufficient evidence to allow a reasonable jury to conclude that overall the company consistently chose the white candidate, and that in the case of Harris (who, unlike the other seven, may not have seemed to the jury to be the

better candidate), the company's claim that it picked the better candidate without regard to race was a pretext to cover discriminatory behavior.

During the course of a trial, jurors listen to witnesses, pass judgment on their credibility, and, in this kind of case, absorb something about the culture of a company; they are pretty good at bringing their common sense to bear on questions of human behavior. This is what juries are for, and in the close case, as this one indisputably is, the jury's judgment should be respected unless no reasonable person could have found as it did. And this jury, it seems, was so convinced that racial discrimination prevented Millbrook from getting the promotion that it tacked on, in its discretion, an award of punitive damages. Accordingly, I would not disturb the jury's verdict.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF ILLINOIS DATED AND FILED SEPTEMBER 22, 2000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case Number: **98-4121**

Gary Millbrook

vs.

IBP, Inc.

JUDGMENT IN A CIVIL CASE

☒ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff and against the defendant. Compensatory damages are awarded to the plaintiff and against the defendant in the amount of $32,500.00 and punitive damages are awarded to plaintiff and against the defendant in the amount of $100,000.00 plus costs of suit.

Appendix B

ENTER this 22nd day of September, 2000

JOHN M. WATERS, CLERK

s/ Denise Koester
BY: DEPUTY CLERK

APPENDIX C — JURY VERDICT FORM DATED AND FILED SEPTEMBER 21, 2000

JURY VERDICT FORM

The Jury must unanimously agree on the answers to all the questions.

1. Has plaintiff Gary Millbrook proven, more likely than not, that the plaintiff's race was a motivating factor in at least one of defendant IBP, Inc.'s, decisions not to promote the plaintiff?

YES __X__ NO _____

(If your answer to Question No. 1 is "yes," then go on to Question No. 2. If your answer to Question No. 1 is "No," each of you should sign the Jury Verdict form, and you should not answer any more questions.)

2. Has defendant IBP, Inc. proven, more likely than not, that the defendant would have made the same employment decisions concerning plaintiff, even if unlawful motive, namely plaintiff's race, was not present?

YES _____ NO __X__

(If your answer to Question No. 2 is "No," then go on to Question No. 3. If your answer to Question No. 2 is "Yes," each of you shoud sign the Jury Verdict Form, and you should not answer any more questions.)

Appendix C

3. Under the law as given to you in these instructions, state the amount of damages plaintiff should be awarded from defendant, itemized as follows:

Back pay	$25,000.00
Emotional pain and suffering/inconvenience and mental anguish	$ 7,500.00
TOTAL:	$32,500.00

4. Is Plaintiff, Gary Millbrook, entitled to punitive damages?

YES ___X___ NO _____

(If your answered "Yes" go on to Question 5. If your answer to Question No. 4 is "No," each juror should sign the Jury Verdict Form, and you should not answer any more questions.)

5. Under the law as given to you in these instructions, state the amount, if any, of punitive damages that the plaintiff, Gary Millbrook, should be awarded from defendant.

Punitive damages	$100,000.00

Appendix C

s/ Marsha Woolley
Foreperson

s/ Elizabeth Johnson
s/ [illegible]
s/ Susan Rothzen
s/ [illegible]
s/ [illegible]
s/ Mrs. Joan Jenkins
s/ Shannon Hofer

Appendix C

SPECIAL INTERROGATORY

OFFER DATE	SUCCESSFUL CANDIDATE	YES	NO
2/28/96	James Toppert	__	X
9/17/96	Christine Graham	__	X
6/30/97	DeWayne Harris	X	__
8/21/97	Donna Tindall & Celia Villagomez	__	X
1/29/98	Elizabeth Baker	__	X
3/6/98	Jody DeKezel	__	X
5/7/98	Jeffrey Rangel	__	X
8/22/98	Diana Lambin	__	X

s/ Marsha Woolley
Foreperson

s/ Elizabeth Johnson
s/ [illegible]
s/ Susan Rothzen
s/ [illegible]
s/ [illegible]
s/ Mrs. Joan Jenkins
s/ Shannon Hofer

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 19, 2002

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 19, 2002

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 01-1189

Gary Millbrook,

Plaintiff-Appellee,

v.

IBP, Incorporated, a Delaware Corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois

No. 98-4121

Michael M. Mihn, *Judge.*

Appendix D

ORDER

Plaintiff-Appellee filed a petition for rehearing *en banc* on March 6, 2002. After consideration of the petition and the answer thereto filed on March 25, 2002, a vote of the active members of the court was requested. The petition for rehearing en banc was denied by a majority of the court.[1] A majority of the judges on the original panel voted to deny rehearing. The petition for rehearing is therefore DENIED.

---

1. Circuit Judges Ripple, Rovner, Diane P. Wood, Evans and Williams voted to grant rehearing en banc.

APPENDIX E — MINUTE ORDER DATED OCTOBER 30, 2000 AND RECEIVED NOVEMBER 1, 2000

United States District Court
for the Central District of Illinois
October 30, 2000

Case Minutes - General

Case No. 4:98-cv-04121

Title: Millbrook v. IBP, Inc.

*** DATE OF OCCURRENCE: 10/26/00 ***

DOCKET ENTRY

MINUTE-ENTRY: by Judge Michael M. Mihm. Parties present via phone with Attys Doak/Shaff for motion hearing held re motion for order for front pay for instatement [79-1], re motion for attorney fees and costs [78-1]. Arguments by counsel. Court is denying motion for judgment as a matter of law [81-1] and denying motion for new trial [81-2]. Court finds the issue of instatement was not waived. Court is setting the motion for order for front pay for instatement [79-1] and the motion for attorney fees and costs [78-1] for a further MOTION HEARING with testimony from supervisors at 9:00 on Tuesday, 11/7/00 in person in Peoria. (cc: all counsel)

APPENDIX F — STATUTE, CONSTITUTIONAL PROVISION AND RULE INVOLVED

42 U.S.C. § 2000e-2(a)(1)

(a) Employer practices

It shall be an unlawful employment practice for an employer —

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
>
> * * * *

U.S.C.A. Const. Amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Appendix F

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion

no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the

motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

APPENDIX G — LOWER COURT DECISIONS LIMITING USE BY PLAINTIFFS OF EVIDENCE OF COMPARATIVE QUALIFICATIONS

Courts of Appeals

Walker v. Prudential Property and Casualty Insurance Co., 286 F. 3d 1270, 1277 (11th Cir. 2002)(Title VII)

Price v. Federal Express Corp., 283 F. 3d 715, 722-23 (5th Cir. 2002)(Title VII)

Bernales v. County of Cook., 2002 WL 1022011 *2 (7th Cir)(Title VII)

Cofield v. Goldkist, Inc., 267 F. 3d 1264,1268 (11th Cir. 2001)(Title VII and ADEA)

Celestine v. Petroleos de Venezuella SA, 266 F. 3d 343, 356-57 (5th Cir. 2001)(Title VII)

Denney v. City of Albany, 247 F. 3d 1172 (11th Cir. 2001)(Title VII and section 1985)

Byrnie v. Town of Cromwell, Board of Education, 243 F. 3d 93, 103 (2d Cir. 2001)(Title VII, Title IX, ADEA)

Brown v. Kinney Shoe Corp., 237 F. 3d 556, 565 (5th Cir. 2001)(Title VII)

Lee v. GTE Florida, Inc., 226 F. 3d 1249, 1255 (11th Cir. 2000)(Title VII, state anti-discrimination law)

Appendix G

Alexander v. Fulton County, Georgia, 207 F. 3d 1303, 1339 (11th Cir. 2000)(Title VII)

Rutherford v. Harris County, Texas, 197 F. 3d 173, 182 n. 9 (5th Cir. 1999)(Title VII)

Bullington v. United Air Lines, Inc., 186 F. 3d 1301, 1319 (10th Cir. 1999)(Title VII and the ADEA)

Deines v. Texas Department of Protective and Regulatory Services, 164 F. 3d 277, 279 (5th Cir. 1999)(Title VII)

Scott v. University of Mississippi, 148 F. 3d 493, 508-510 (5th Cir. 1998)(ADEA)

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Ruiz v. Posadas de San Juan Associates, 124 F. 3d 243, 251 (1st Cir. 1997)(ADEA and Puerto Rican anti-discrimination law)

Lehman v. Prudential Insurance Co., 74 F. 3d 323, 329 (1st Cir. 1996)(state anti-discrimination law)

EEOC v. Louisiana Office of Community Services, 47 F. 3d 1438, 1444-45 (5th Cir. 1995)(ADEA)

Bodenheimer v. PPG Industries, Inc., 5 F. 3d 955, 959 (5th Cir. 1993)(ADEA)

Odom v. Frank, 3 F. 3d 839, 845-47 (5th Cir. 1993)(Title VII)

Appendix G

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Richane v. Fairport Central School District, 179 F. Supp. 2d 81, 90-91 (W.D.N.Y. 2001)(ADEA, state anti-discrimination law)

McFadden v. Lockheed Martin Information Systems, 2002 WL 596352 *7 (M.D.Fla. 2002)(Title VII, ADEA)

Brown v. Raytheon Aircraft Co., 196 F. 3d 1131, 1147 n. 9 (D. Kan. 2002)(section 1981)

Sandman v. Mediamark Research, Inc., 2002 WL 424660 *5-*6 (S.D.N.Y.)(Title VII, state and city anti-discrimination laws)

Ratcliff v. Exxonmobil Corp., 2002 WL 1315625 *8-*9 (E.D.La.)(Title VII, ADEA)

Mustafa v. State of Nebraska Department of Correctional Services, 196 F. Supp. 2d 945, 953-54 (D.Neb. 2002)(Title VII)

Daniels v. Home Depot, Inc., 2002 WL 1398643 *9 (E.D.La.)(Title VII, state anti-discrimination law)

Hernandez Marrero v. Crowley American Transport, Inc., 2002 WL 1363506 *5 (D.P.R.)(Title VII, ADEA, anti-discrimination law of Puerto Rico)

Appendix G

Crawford-Mulley v. Corning Incorporated, 194 F.Supp. 2d 212, 219-20 (W.D.N.Y. 2002)(section 1981, state anti-discrimination law)

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Carter v. Delaware State University, 2002 WL 335309 *6 (D.Del.)(Title VII, section 1981, section 1983, sections 1985-86)

Miller v. Bed, Bath & Beyond, Inc., 185 F. Supp. 2d 1253, 1270-71 (N.D.Ala. 2002)

Ellenbogen v. Projection Video Services, Inc., 2001 WL 736774 *7-*8 (S.D.N.Y.)(Title VII, state and city anti-discrimination laws)

Humphrey v. Potter, 162 F. Supp. 2d 1354, 1362-63 (S.D. Fla. 2001)(Title VII)

Thomesen v. West, 2001 WL 163611 *4-*6 (E.D.N.Y.)(Title VII)

Jones v. Siegelman, 2001 WL 1772159 *4-*6 (M.D.Ala.)(Title VII, ADEA)

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Tarrance v. Montgomery County Bd. of Educ., 157 F. Supp. 2d 1261, 1264 (M.D.Ala. 2001)(Title VII)

Scally v. The Burlington Northern and Santa Fe Railway Co., 2001 WL 1577626 *5 (N.D.Tex.)(Title VII)

Haire v. United States, 101 F. Supp. 2d 478, 484 (N.D.Miss. 2000)(Title VII)

Taylor v. Williams, 2000 WL 1844698 *3 (S.D.Ala.)(Title VII)

Solorzano v. Shell Chemical Co., 2000 WL 1252555 *7-*8 (E.D.La.)(Title VII, ADEA)

Pennington v. City of Huntsville, Alabama, 93 F. Supp. 1201, 1217-18 (N.D.Ala. 2000)(Title VII)

McVicker v. Albemarle Corp., 2000 WL 1034541 (M.D.La.)(ADEA)

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Burney v. Rheem Manufacturing Co., Inc., 196 F.R.D. 659, 674-78 (M.D.Ala. 2000)(Title VII)

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Farrokhi v. Laura Ashley, Inc., 82 F. Supp. 2d 1248, 1252 (D.N.Mex. 1999)(Title VII)

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Byrnie v. Town of Cromwell Public Schools, 73 F. Supp. 2d 204, 212-13 (D.Ct. 1999)(Title VII, ADEA, Title IX, state anti-discrimination law)

Coblentz v. Glickman, 1999 WL 8162666 *6 (E.D.La.)(Title VII)

Vargas v. Puerto Rican-American Insurance Co., 52 F. Supp. 2d 305, 310-11 (D.P.R. 1999)(ADEA)

Yousuf v. UHS of De La Ronde, Inc., 1999 WL 109565 *9 (E.D.La.)(Title VII, section 1981)

Oliver v. United States of America, Department of Defense, 44 F. Supp. 2d 821, 825 (W.D.Tex. 1999)(Title VII)

Camp v. Lockheed Martin Corp., 1998 WL 966002 (S.D.Tex.)(ADEA)

Abraham v. Community Hospital of Mesquite, Inc., 19 F. Supp. 2d 660, 665 (N.D.Tex. 1997)(Title VII, ADEA)

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Dudley v. Wal-Mart Stores Inc., 931 F. Supp. 773, 805-06 (M.D.Ala. 1996)

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Jaso v. Travis County Juvenile Board, 6 S.W. 3d 324, 329 (Tex. Ct. App. 1999)(state anti-discrimination law)

Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

No. 02-120

IN THE

Supreme Court of the United States

GARY MILLBROOK,

Petitioner,

v.

IBP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

MARTHA L. SHAFF
BETTY, NEUMAN
& MCMAHON, L.L.P.
111 East Third Street
Suite 600
Davenport, IA 52801
(563) 326-4491

JAMES S. WHITEHEAD
Counsel of Record
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Counsel for Respondent

175725

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

In an employment discrimination case, can a jury verdict for a plaintiff who claims to have been denied a promotion because of his race be upheld when (i) the plaintiff has presented no direct or circumstantial evidence of intentional racial discrimination other than his allegedly superior qualifications, and (ii) the disparity between his qualifications and those of the selected candidate is not so favorable to him that there can be no dispute among reasonable persons of impartial judgment that he was clearly better qualified and, hence, there is no basis for finding that the employer's assertion that it selected the candidate it believed to be the better candidate is a lie and a pretext for unlawful discrimination?

CORPORATE DISCLOSURE STATEMENT

Respondent IBP, inc. is a wholly owned subsidiary of Tyson Foods, Inc., a publicly held company.

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Fischbach v. District of Columbia Dept. of Corrections, 86 F.3d 1180 (D.C. Cir. 1996) 17

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Hase v. Missouri Div. of Employment Sec., 972 F.2d 893 (8th Cir. 1992), *cert. denied*, 508 U.S. 906 (1993) 19, 20

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S. Ct. Rule 10 10

RESPONDENT'S BRIEF IN OPPOSITION

Respondent IBP, inc. ("IBP') hereby opposes the petition for a writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

IBP operates a meat processing plant in Joslin, Illinois. As a meat processor, IBP is regulated by the United States Department of Agriculture. Petitioner Gary Millbrook, an African-American, was hired by IBP as a janitor at the Joslin plant in November 1995.

IBP employs 40 Quality Control Inspectors at Joslin. Tr. 60-61. The QC Inspectors are in charge of inspecting the plant's end-products, assuring that they meet the standards of the USDA, IBP, and IBP's customers. QC Inspectors are responsible for completing the paperwork required by the USDA. Tr. 214. They also have responsibility for communicating with IBP production supervisors concerning issues of product quality. Tr. 24-25. As a result, it is not uncommon for there to be confrontations between the QC Inspectors and production supervisors. Tr. 64.

IBP has established certain minimum requirements for applicants for the QC Inspector position. Candidates are required to possess good mathematical skills, good communications skills, safety awareness, good judgment, and the ability to work with others in a management support role. Tr. 278. Candidates are preferred who have college studies in animal science, previous quality control experience, and/or knowledge of processing/carcass operations. The main criteria that IBP applies in assessing candidates are their safety consciousness, their ability to communicate effectively. and their attendance records. Tr. 13-14, 31. IBP selects the most qualified of the candidates

based on the information contained in their resumes or applications and their performance during an interview with the hiring supervisor. Tr. 52, 214-15, 221-22.

Between 1996 and 1998, Millbrook applied for ten vacant QC Inspector positions. He had worked solely as a janitor for IBP since November 1995 (Tr. 86) and had not held any production or floor positions there. Tr. 155. Prior to working for IBP, he had served as chief custodian at Black Hawk College. Tr. 85. During the 1960s (long before new USDA quality standards were implemented (Tr. 65, 217)), he had worked in a variety of jobs for another meat packer for nine months, but none of those positions involved quality control responsibilities. Tr. 92. His attendance record at IBP was good (Tr. 97) and he had a perfect safety record (*ibid.*), but he had not been recognized by IBP for any safety or other awards. Tr. 165. Millbrook had a college degree in education and liberal arts (Tr. 85), but he had not taken any animal science or quality control courses. Tr. 145. He was not selected for any of the ten QC Inspector positions.

One of the QC Inspector positions for which Millbrook applied was awarded to DeWayne Harris, an external candidate. Harris had not worked at IBP and had not worked with cattle or beef. Tr. 207. While he did not have a college degree, he had taken courses in quality management (Tr. 207) and had prior quality control work experience while serving in the military. Tr. 208. In addition, he had demonstrated leadership skills while serving as a sergeant and platoon leader in the Air Force. Tr. 224. Finally, he had received the "Communicator of the Year" award from the Air Force in 1995. Tr. 223.

Audrey Jordan, one of IBP's two Quality Control Supervisors, made the decision to award the QC Inspector position to Harris rather than Millbrook. Tr. 205. She interviewed both men. Based on Millbrook's interview, she did not believe "he would have what it takes to put up with the confrontation,

the intimidation that the production supervisors or upper management would give a quality assurance inspector in various aspects of their job." Tr. 216. Millbrook had a difficult time looking at her while he answered her questions, and he did not seem confident in his answers. Tr. 241. She selected Harris because he had previous experience in quality control, had taken courses in quality management, and had received the Communicator of the Year Award. Tr. 224. Harris was very energetic and demonstrated self-confidence during the interview. Jordan concluded that he could handle the pressures of the position, particularly the confrontations that occur between productions supervisors and quality assurance. Tr. 223. Ultimately, she concluded that Harris was the more qualified candidate for the position. Tr. 224.[1]

Millbrook filed suit against IBP on November 30, 1998, alleging that he had been denied eight of the ten QC Inspector positions because of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981.[2] At the conclusion of a three-day trial, the

1. Millbrook's only testimony comparing his qualifications with those of Harris came in response to two questions asked by his counsel:

> Q And did you know whether or not Mr. Harris was an employee of IBP prior to him being offered this position?
>
> A He was not.
>
> Q You believe you were more qualified than he was?
>
> A I believe that to be true.

Tr. 105. On cross-examination, he acknowledged that he did not know what Harris' qualifications were. Tr. 163. As the Seventh Circuit observed, fewer than five of the 443 pages of the trial transcript dealt with IBP's selection of Harris over Millbrook. Pet. App. 26a.

2. Millbrook acknowledged at trial that the successful candidates for two of the ten positions he had sought had been more qualified than he. Tr. 90.

jury returned a verdict finding that IBP had not discriminated against Millbrook in filling seven of the positions but finding in favor of Millbrook in connection with the selection of Harris. Pet. App. 37a. The jury awarded Millbrook $25,000 in back pay, $7,500 for emotional distress, and punitive damages of $100,000. Pet. App. 35a. The district court denied IBP's motions for judgment as a matter of law and for a new trial (Pet. App. 40a) and ordered IBP to promote Millbrook to QC Inspector when the position next became vacant, paying him at the level of the QC Inspector position in the meantime.

IBP filed a timely appeal to the United States Court of Appeals for the Seventh Circuit.[3] On February 20, 2002, a panel of the Seventh Circuit reversed the judgment in favor of Millbrook, one judge dissenting.

At the outset of its opinion, the appellate court observed that the sole issue on appeal was whether sufficient evidence had supported the jury's finding that IBP intentionally had discriminated against Millbrook on the basis of his race when it chose Harris, rather than him, for the QC Inspector position. Pet. App. 5a. Millbrook did not contend that he had presented any direct evidence of a discriminatory motivation; accordingly, he relied solely on the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework. Pet. App. 6a. As the appellate court noted, there was no dispute that Millbrook had made out a *prima facie* case of race discrimination or that IBP had articulated a legitimate, nondiscriminatory explanation for its selection of Harris — its determination that Harris was the better-qualified candidate. Pet. App. 7a. Accordingly, the court turned its attention to the evidence supporting Millbrook's assertion that IBP's stated reason was false, *i.e.*, pretextual. *Ibid.*

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3. Millbrook did not cross-appeal from the jury's findings in IBP's favor on seven of the eight promotions he had sought.

"Pretext," the Seventh Circuit explained, "'means a lie, specifically a phony reason for some action.'" Pet. App. 8a, *quoting Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995). "Thus, even if IBP's reasons for selecting Harris over Millbrook were 'mistaken, ill considered or foolish, so long as [the employer] honestly believed those reasons, pretext has not been shown.'" Pet. App. 8a-9a, *quoting Jordan v. Summers*, 205 F.3d 337, 343 (7th Cir. 2000).

The court then examined the evidence concerning whether IBP's explanation for selecting Harris was a lie. The Seventh Circuit rejected various arguments offered by Millbrook in support of this conclusion — that IBP had provided a different explanation at trial for Harris' selection than it had during the interview process (the Seventh Circuit found no supporting evidence), that Harris had not submitted a resume in connection with his candidacy (instead, like all external candidates, he had completed a more extensive application form), that Jordan had made allegedly "negative subjective comments . . . regarding other African-American applicants" (Pet. App. 10a) (the court observed that the statements were all "race neutral"), and that during 1996 and 1997 Jordan had not hired any blacks as QC Inspectors (Millbrook had failed to present evidence concerning the number of positions filled during those years or the racial makeup of the candidate pools) — as failing to create a reasonable inference that IBP had lied concerning its reasons for selecting Harris. Pet. App. 9a-13a.

The court then considered Millbrook's sole remaining argument: that it was appropriate for the jury to compare his qualifications with those of Harris and that the jurors "could easily have concluded" that Millbrook was the more qualified candidate. Pet. App. 13a. The Seventh Circuit reviewed the evidence concerning the differing qualifications possessed by the candidates and concluded, "What we have here then are

two qualified applicants with varying credentials, and different views as to which candidate is best for the job." Pet. App. 14a. The court summarized Millbrook's argument as follows: "[W]hen an employer asserts that it chose another applicant over the plaintiff because the selected candidate was more qualified, the jury may return a verdict of discrimination if, after reviewing the applicants' relative qualifications, it simply does not believe the employer's assertion." *Ibid.*

The court rejected Millbrook's contention that a mere dispute over the assessment of competing candidate qualifications, by itself, can support an inference of a discriminatory motivation: "[A]bsent such additional evidence of discrimination [beyond the relative qualifications of the candidates], this court has held that a jury verdict for the employee cannot stand if the jury is simply disagreeing with the company as to who is best qualified." Pet. App. 16a, *citing Lindale v. Tokheim Corp.*, 145 F.3d 953 (7th Cir. 1998), and *Guerrero v. Ashcroft*, 253 F.3d 309 (7th Cir. 2001). The Seventh Circuit observed that the Second, Fifth, Tenth, Eleventh, and D.C. Circuits had similarly so held (Pet. App. 18a-20a) and adopted as its holding the standard articulated by those courts:

> [W]here an employer's proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants' competing qualifications does not constitute evidence of pretext "unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." *Deines[v. Texas Dept. of Protective & Regulatory Servs.]*, 164 F.3d [277] at 279 [(5th Cir. 1999)]. In other words, "[i]n effect, the plaintiff's credentials would have

> to be so superior to the credentials of the person selected for the job that 'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'" *Byrnie [v. Town of Cromwell Pub. Schs.*], 243 F.3d [93] at 103 [(2d Cir. 2001)] (quoting *Deines*, 164 F.3d at 280-81).

Pet. App. 20a-21a.

The Seventh Circuit found this standard to be consistent with the underlying purposes of the federal discrimination laws.

> [A] court's "role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second-guesses employers' business judgments." *Simms[v. Oklahoma ex rel. Department of Mental Health & Substance Abuse Servs.*,] 165 F.3d [1321] at 1330 [10th Cir. 1999]. . . . If we were to allow a jury to evaluate competing credentials to determine whether the employer's assertion that it selected the best candidate was pretextual, the jury would in most cases be replacing the employer's personnel department.

Pet. App. 21a. The court also observed that this standard was consistent with admonitions in its prior decisions that a discrimination plaintiff cannot support a claim solely with the plaintiff's own opinions of his/her work performance or qualifications (*citing Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996)) or the opinions of a co-worker (*citing Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994)). Pet. App. 21a-22a. "'[W]ithout proof of a lie [as to what the employer believed] no inference of discriminatory motive can be drawn.'" Pet. App. 22a, *quoting Olsen v. Marshall*

& Ilsley Corp., 267 F.3d 597, 602 (7th Cir. 2001). Thus, the court concluded, "without some affirmative evidence calling into question IBP's credibility, Millbrook must lose." Pet. App. 23a.

The Seventh Circuit found that, in relying solely on the differences between his qualifications and those of Harris,[4] Millbrook had failed to carry his ultimate burden of proving that IBP had selected Harris instead of him because of his race:

> While Millbrook believes the jury should be allowed to review the candidates' relative qualifications to

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4. As the Seventh Circuit summarized those differences:

> [W]e note initially that it is a close question as to whether Millbrook's qualifications are equivalent to or exceed those of Harris. While Millbrook had a college education, his degree was in an unrelated field, education, and Harris had completed some college course work in the relevant area of management. Harris also had experience in quality control, whereas Millbrook did not. Harris' tour of duty with the military is also a credential highly valued by many employers because of the discipline, respect, work ethic, and many other valuable virtues military service instills. And, during his time with the Air Force, Harris demonstrated his communication skills, as documented by his Communicator of the Year Award. IBP explained that it sought out candidates with such qualifications because Quality Control Inspectors must possess superior communication skills given the confrontational nature of the position. But, even assuming that Millbrook was better qualified than Harris, his credentials were not clearly superior, and therefore a reasonable employer could have concluded that Harris was the better person for the job. Accordingly, a comparison of the relative qualifications of Millbrook and Harris is by itself not probative of pretext.

Pet. App. 23a-24a.

> decide whether or not IBP lied, without any evidence calling into question IBP's veracity, what this case really comes down to is the jury deciding which applicant is more qualified. But believing or not believing the decisionmaker is simply saying that the employer made the wrong choice — which is not illegal. Because there is no evidence of pretext, Millbrook has failed to create an inference that IBP intentionally discriminated against him by hiring Harris.

Pet. App. 25a.

Alternatively, the court ruled that, even assuming that Millbrook had presented evidence of pretext, "at best 'he created only a weak issue of fact as to whether the employer's reason was untrue.'" Pet. App. 26a, *quoting Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000). The appellate court reviewed the trial court record and found that

> [t]here is absolutely no other evidence of intentional discrimination — not one racist comment, nor any harassment. . . . In short, Millbrook has no proof that IBP denied him a promotion because of his race. The case he presented is simply not enough under *Reeves* to sustain a jury verdict in his favor, even if some evidence of pretext had existed.

Pet. App. 26a.[5]

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5. One judge (Evans, J.) dissented. Judge Evans would have deferred to the jury verdict, explaining, "[I]n the close case, as this one indisputably is, the jury's judgment should be respected unless no reasonable person could have found as it did." Pet. App. 31a.

Millbrook's timely petition for rehearing and suggestion for rehearing *en banc* were denied on April 19, 2002.[6]

REASONS FOR DENYING THE WRIT

The Seventh Circuit's holding — that a jury verdict for a discrimination plaintiff cannot stand when the plaintiff has presented no direct or circumstantial evidence of intentional promotion discrimination other than his allegedly superior qualifications, unless the disparity between his qualifications and those of the selected candidate is so great as to permit an inference that the employer's claim to have selected the better candidate is false and, hence, a pretext for discrimination — is consistent with the decisions of this Court, decisions from other appellate courts, and the underlying purposes of our nation's equal employment opportunity statutes. The decision below was simply a routine application of well-settled standards to the unique facts in this case. Accordingly, there is no compelling reason for the Court to grant Millbrook's petition, which should be denied. S. Ct. Rule 10.

I. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner asserts that the decision below is inconsistent with twenty years of precedent from this Court authorizing a plaintiff to rely on evidence of allegedly superior qualifications in support of a claim of hiring or promotion discrimination because the trier of fact may "disbelieve an employer's assertion that it rejected the plaintiff because he or she was less qualified, and . . . conclude that the proffered explanation was a pretext for discrimination." Petition at 5. Petitioner asserts that the

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6. A majority of the active circuit judges voted not to rehear the case *en banc*. Five judges would have granted such rehearing. Pet. App. 38a-39a.

Seventh Circuit decision, and those from the circuits on which it relied, "have severely limited this method of proof" in a manner inconsistent with this Court's decisions. *Ibid.* This is not correct. None of this Court's decisions authorizes a finding of intentional discrimination based solely on the evidence submitted by Petitioner in this case — evidence that the plaintiff's qualifications simply differed from, but were not manifestly superior to, those of the successful candidate.

On several prior occasions this Court has recognized — consistent with the holding below — that disparities in qualifications *may*, together with other direct or indirect evidence of a discriminatory motivation, support a finding of intentional discrimination in an appropriate case. For example, in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981), the Court observed that "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this *may* be probative of whether the employer's reasons are pretexts for discrimination." (Emphasis added.) But this Court did not rule that *any* difference in qualifications between the plaintiff and the successful candidate would support a finding of discrimination, only that evidence that the employer had misjudged those qualifications "may" permit such a finding in an appropriate, but undefined, set of circumstances.[7]

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7. This Court approvingly cited *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), and *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980), in support of this aspect of its *Burdine* decision. *See* 450 U.S. at 259. Both support the Seventh Circuit's conclusion that a jury's mere disagreement with an employer's assessment of the candidates' relative qualifications, by itself, cannot support a finding of discrimination absent such a significant disparity as to call into question the employer's veracity. *See Loeb*, 600 F.2d at 1012 n.6 ("The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one. The jury must understand that its focus is to be on the (Cont'd)

In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), this Court also considered a hiring discrimination claim in which comparative qualifications evidence had played a role. In reversing a circuit court decision that had set aside a judgment for the plaintiff, this Court observed that the plaintiff had produced direct evidence that the male members of the selection committee had been biased against her because she was a woman and evidence that she had been asked questions during the selection process that had not been asked of male candidates. *Id.* at 569. In addition, this Court noted that the district court's finding of pretext had been based on the fact that the selection committee members had been inconsistent in the weight they gave experience and education in evaluating male candidates. *Id.* at 570. To be sure, this Court acknowledged that the district court also had found that the plaintiff was "better qualified" than the successful male candidate to perform the duties required of the position based on her prior employment and community experience. *Id.* at 568-69.[8] But, nothing in this Court's decision

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employer's motivation, however, and not on its business judgment."); *Lieberman*, 630 F.2d at 65 (plaintiff can demonstrate pretext by "show[ing] that the asserted neutral basis was so ridden with error that defendant could not honestly have relied upon it").

8. The plaintiff's qualifications for the position of Recreation Director (college degrees in social studies and education, years of experience as a classroom teacher responsible for supervising children in recreational and athletic activities, employment as a hospital recreation director, extensive involvement in a variety of civic organizations, knowledge of sports as a high school athlete and as a mother of children involved in organized athletics, skills as a public speaker, experience in handling money, and knowledge of music, dance, and crafts (470 U.S. at 568-69)) were so superior to those of the 24-year-old male selected for the position, who had just recently graduated from college with a physical education degree (*id.* at 567), that "no reasonable employer could believe that it [had] selected the best candidate," in the words of the standard applied by the Seventh Circuit in the instant case. Pet. App. 29a.

suggests that the Court necessarily would have reached the same decision solely based on the comparative qualifications evidence in the absence of the express findings by the district court, fully supported by the evidence, that "the committee had been biased against hiring a woman, and that the committee's explanations for its choice of Mr. Kincaid were pretextual[.]" *Id.* at 570. *See also id.* at 580 ("The District Court's findings regarding petitioner's superior qualifications *and the bias of the selection committee* are sufficient to support the inference that petitioner was denied the position of Recreation Director on account of her sex."). (Emphasis added.)

Nor is there a conflict between the decision below and *United States Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711 (1983).[9] As in *Anderson*, the plaintiff claiming promotion discrimination in *Aikens* had introduced direct evidence of the discriminatory animus of the decisionmaker, who had made "numerous derogatory comments about blacks in general and Aikens in particular." *Id.* at 713 n.2. This Court concluded that, if the district court on remand were to find discrimination based on such evidence, coupled with the evidence of a manifest disparity between the plaintiff's qualifications and those of the promoted whites,[10] "we do not believe that this would be

9. Petitioner incorrectly describes *Aikens* as a case in which this Court concluded that a finding of discrimination would be upheld. Petition at 8. In truth, there had been no such "finding." The plaintiff's racial discrimination claims had been dismissed by the district court following a bench trial. The court of appeals had reversed the district court's judgment. This Court concluded that the court of appeals had misinterpreted the burdens imposed under the *McDonnell Douglas* formula, vacated the court of appeals judgment, and remanded for trial. 460 U.S. at 717.

10. Aikens "had more supervisory seniority and training and development courses than all but one of the white persons who were (Cont'd)

reversible error." *Ibid.* Once again, nothing in *Aikens* remotely suggests that a finding of discrimination can be predicated solely on insubstantial differences in candidate qualifications.

Finally, the Seventh Circuit's decision is consistent with this Court's observation in *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989), that a plaintiff bringing a promotion discrimination claim "*might* seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position." (Emphasis added.) But, this Court emphasized, such evidence is not required for the plaintiff to prevail. "There are certainly other ways in which petitioner could seek to prove that respondent's reasons were pretextual." *Id.* at 188. Thus, this Court concluded that the district court had erred in instructing the jury that the plaintiff could carry her burden of persuasion only by showing that she was in fact better qualified than the white applicant who got the job. *Ibid.* As a result, in *Patterson* this Court had no need to, and did not, consider the nature or quantum of comparative qualification evidence that would suffice to support a finding of pretext and, hence, an inference of intentional discrimination.

In sum, none of this Court's prior decisions has held that evidence of insubstantial differences in the qualifications of the plaintiff and the successful candidate for hiring or promotion is sufficient, *by itself*, to support a finding of pretext, much less

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promoted above him. He has a Masters Degree and has completed three years of residence towards a Ph.D. Aikens had substantially more education than the white employees who were advanced ahead of him; of the 12, only two had any education beyond high school and none had a college degree." 460 U.S. at 713 n.2. As in *Anderson*, this wide disparity in qualifications may well have justified a finding of pretext under the Seventh Circuit's standard even in the absence of Aikens' direct evidence of unlawful animus.

an inference of intentional unlawful discrimination. Petitioner's broad assertion on page 7 of the Petition, that "[i]f . . . the trier of fact concludes that the employer selected the less qualified candidate, it may indeed infer that discrimination was the reason," finds no support in this Court's precedent.

Finally, Petitioner asserts that the Seventh Circuit's decision, as well as the uniform decisions of the other circuits on which it relied (*see* Section II, below), "recreate[s] the evidentiary scheme unanimously rejected by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)." Petition at 21. According to Petitioner, the Seventh Circuit's ruling "resurrects the requirement of direct evidence rejected in *Reeves*." *Id.* at 23. This is incorrect.

In *Reeves*, this Court ruled that a plaintiff, having succeeded in making out a prima facie case under the *McDonnell Douglas* standard and having introduced sufficient evidence to permit the trier of fact to find that the employer's articulated reason for the challenged employment action was false, is not required to produce any additional evidence that the employer's conduct was caused by intentional discrimination. "Thus, a plaintiff's prima facie case, combined with *sufficient evidence* to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer discriminated." 530 U.S. at 148 (emphasis added).

The question that the instant case presents, of course, is whether Petitioner's comparative qualification evidence — the only arguably probative evidence Petitioner presented that his race entered into IBP's selection of Harris — was "sufficient evidence" to permit the jury to find that IBP's reason for selecting Harris, rather than Petitioner, was false and, hence, a pretext for race discrimination. The primary holding of the court below is that, since Petitioner did not present evidence of qualifications that were so clearly superior to those of Harris

for the QC Inspector position that no reasonable person could have believed the latter to be the superior candidate, Petitioner did not present "sufficient evidence" to permit a finding that IBP's statement that it believed Harris to be the better candidate was false.

This Court explained in *Reeves* that

> [w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, *the probative value of the proof that the employer's explanation is false*, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

530 U.S. at 148-49 (emphasis added). In the instant case, the Seventh Circuit, applying a standard that has been adopted uniformly by the courts of appeals, ruled that Petitioner's comparative-qualifications evidence was lacking in probative value and, accordingly, that Petitioner's failure to adduce any other direct or circumstantial evidence that IBP's articulated reason for selecting Harris was false meant that the jury verdict could not stand because of insufficient evidence of intentional discrimination.

Petitioner's statement at page 23 of his Petition that the Seventh Circuit "insisted that the plaintiff adduce evidence of relevant derogatory remarks" is false and is based on a plain misreading of the decision below. Nowhere in its opinion did the Seventh Circuit rule, contrary to *Reeves*, that to submit the case to the jury a plaintiff who has made out a prima facie case *and* who has produced sufficient probative evidence that the employer's explanation is false must also produce direct evidence of discrimination, much less evidence of racially

derogatory remarks. The Seventh Circuit observed that Petitioner had presented no direct evidence of discrimination only after having found that Petitioner could not make out his claim under the *McDonnell Douglas* indirect evidence formula because he had failed to present legally sufficient evidence of pretext. Nowhere in its decision did the court below suggest that it would have set aside a verdict for Petitioner, had he presented evidence of a substantial disparity in qualifications, because of his failure to come forward with direct evidence of discrimination.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH A DECISION OF ANY OTHER UNITED STATES COURT OF APPEALS.

As the Seventh Circuit's decision recites — and as the Petition implicitly acknowledges — the court of appeals' ruling concerning the weight to be given comparative qualification evidence is in harmony with decisions from virtually every circuit. The court below relied on a series of decisions from the Second, Fifth, Tenth, Eleventh, and D.C. Circuits in formulating its holding. Pet. App. 18a-20a. The Petition candidly acknowledges that a similar rule has been adopted by the First Circuit as well.[11]

Although the precise articulation of the standard varies in an immaterial fashion in these decisions,[12] each is predicated

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11. Petition at 15-16, citing *Ruiz v. Posadas de San Juan Assocs.*, 124 F.3d 243, 251 (1st Cir. 1997) ("[I]t cannot be said that [the decision to hire another candidate rather than plaintiff] was so absurd as to defy rational belief."); *Lehman v. Prudential Ins. Co. of Am.*, 74 F.3d 323, 329 (1st Cir. 1996).

12. *See, e.g., Fischbach v. District of Columbia Dept. of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (permitting an inference of discrimination "if the employer made an error too obvious to be unintentional"); *Simms v. Oklahoma ex rel. Dept. of Mental Health &* (Cont'd)

on a common, fundamental understanding: In a case where there is no manifest disparity between the qualifications of the plaintiff and those of the selected candidate, a jury's conclusion that the plaintiff was better qualified, *by itself*, cannot support a conclusion that the employer's claim to have selected the person it believed to have been the better candidate is false, much less an inference of intentional unlawful discrimination. In other words, absent other credible evidence, whether direct or circumstantial,[13] that the employer's true reason for rejecting the plaintiff was his race, a finding for the plaintiff cannot be predicated simply on the fact-finder's second-guessing of the employer's assessment of the candidates' relative qualifications.

At pages 10-13 of the Petition, Petitioner suggests that the decision below is in conflict with decisions from the

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Substance Abuse Servs., 165 F.3d 1321, 1330 (10th Cir.) (denying such an inference if "neither [candidate] is clearly better qualified"), *cert. denied*, 528 U.S. 815 (1999); *Denney v. City of Albany*, 247 F.3d 1172, 1187 (11th Cir. 2001) (allowing such an inference if there is "a strong showing of a disparity in qualifications"); *Deines v. Texas Dept. of Protective & Regulatory Servs.*, 164 F.3d 277, 279 (5th Cir. 1999) (allowing an inference only where "there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue").

13. Nothing in the Seventh Circuit's decision — or in the decisions of the other circuits on which it relied — supports Petitioner's hyperbolic interpretation of the court's holding that, "so long as a rational employer might have rejected the plaintiff, the discrimination claim will fail unless the employer was so inept as to leave a smoking gun of direct evidence." Petition at 15. Indeed, as this Court explained in *Patterson*, 491 U.S. at 188, "There are certainly other ways [other than relying on a comparison of qualifications] in which petitioner could seek to prove that respondent's reasons were pretextual." Such evidence can be either direct or circumstantial in nature.

Eighth, Ninth, and Third Circuits.[14] Petitioner's analysis is predicated on the flawed assertion that the Seventh Circuit has "[e]ffectively [b]ar[red]" or "largely prohibited" the use of comparative qualifications evidence in proving discrimination (Petition at 13), while the Eighth, Ninth, and Third Circuits uncritically have relied on such proof. In truth, the decisions of these latter circuits are in harmony with the Seventh Circuit's decision below.

Petitioner incorrectly describes *Chock v. Northwest Airlines*, 113 F.3d 861 (8th Cir. 1997), as a case in which the Eighth Circuit reversed a district court decision because of the lower court's failure to consider comparative qualifications evidence. Petition at 10. In fact, the Eighth Circuit *affirmed* the summary judgment entered for the employer. 113 F.3d at 866. The court of appeals acknowledged that comparative qualifications evidence "'could reasonably lead a trier of fact to infer that Defendant's proffered reasons were pretextual'" (*id.* at 864, *quoting Hase v. Missouri Div. of Employment Sec.*, 972 F.2d 893, 897 (8th Cir. 1992), *cert. denied*, 508 U.S. 906 (1993)), and that, "if such a comparison were to successfully challenge the employer's articulated reason," it could support a reasonable inference that discrimination was the motivating reason for the decision. *Ibid.*, *citing Ryther v. KARE 11*, 108 F.3d 832, 836 (8th Cir.) (*en banc*), *cert. denied*, 521 U.S. 1119 (1997). But, having confirmed the potential relevance of evidence of comparative qualifications, the Eighth Circuit in *Chock*

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14. Petitioner erroneously asserts that the Seventh Circuit's 6-5 vote on the petition for rehearing *en banc* demonstrates a split on that court that "reflects a similar conflict among the courts of appeals." Petition at 6. The fact that five active Seventh Circuit judges felt this case merited *en banc* consideration is no more indicative of how those judges would have voted on the merits than is a dissent by a member of this Court from an order denying a petition for a writ of certiorari.

then addressed under what circumstances such an inference fairly could be drawn — when such a comparison would "successfully challenge the employer's articulated reason" — and concluded, consistent with the Seventh Circuit decision herein, "[A] comparison that reveals that the plaintiff was *only similarly qualified* or not as qualified as the selected candidate would *not* raise an inference of racial discrimination." *Ibid.* (emphasis added), *citing Lidge-Myrtil v. Deere & Co.*, 49 F.3d 1308, 1309-11 (8th Cir. 1995). *See also Pierce v. Marsh*, 859 F.2d 601, 604 (8th Cir. 1988) ("The mere existence of comparable qualifications between two applicants, one black male and one white female, alone does not raise an inference of racial discrimination."), on which the Eighth Circuit relied in *Chock*, 113 F.3d at 864.[15]

Nor is there conflict between the Seventh Circuit's decision and that of the Ninth Circuit in *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595 (9th Cir. 1993), cited at page 11 of the Petition. The district court in that case had entered judgment for the plaintiff based on its finding that the employer had not proven that the successful applicants were "clearly superior" to Odima. *Id.* at 599. The Ninth Circuit ruled that the district court had erred, *inter alia*, in placing the burden on the employer to prove that the selected candidates were better than the plaintiff and instructed the district court on remand to compare the qualifications of the plaintiff and the successful candidates.

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15. In *Hase*, 972 F.2d at 897 (Petition at 11), the Eighth Circuit vacated the employer's summary judgment and remanded for trial because the disparity between the qualifications of the plaintiff and those of the successful applicant was so great that it indicated the existence of a genuine issue of material fact, particularly where "the relative merit of each party's case depends significantly on credibility." The decision in *Hase* is hardly inconsistent with the Seventh Circuit's post trial decision in the instant case.

But, in language that echoes the analysis of the Seventh Circuit in the instant case, the Ninth Circuit cautioned:

> The district court must not substitute its own judgment about whether the employment decisions were wise, or even fair, for that of the employer. *The closer the qualifications of the candidates, the less weight the court should give to perceived differences in qualifications* in deciding whether the proffered explanations were pretextual.

Id. at 602 (emphasis added).

Finally, there is no conflict between the Third Circuit decision on which Petitioner relies at page 12 of the Petition — *Seaman v. Coplay Cement Co.*, 26 F.3d 428 (3d Cir. 1994) — and the Seventh Circuit decision below. In *Seaman*, an older employee complained that he had been laid off as part of a reduction-in-force while younger workers had been retained, in violation of the ADEA. The Third Circuit vacated a judgment in favor of the plaintiff because of an error in the jury instructions and remanded for a new trial. *Id.* at 438-39. The court had no reason to engage in an extended discussion of the plaintiff's comparative qualifications evidence. In ruling that the employer had failed to demonstrate that the trial court should have granted it judgment as a matter of law, the court of appeals observed that Seaman had introduced evidence that the employer's explanation for the plaintiff's layoff (that sales to house accounts would be handled by the company's chief operating officer and vice-president of sales, rather than by the members of its sales force) was false. *Id.* at 433. Accordingly, the court concluded that there were "factual issues requiring a credibility assessment by the trier of fact. . . ." that made the entry of judgment as a matter of law inappropriate. *Ibid.*

In passing, the court also observed that Seaman had introduced evidence that he had more experience in the cement industry and was "more qualified" than some of the younger salesmen who had been retained. *Ibid.* But, the Third Circuit did not describe this evidence, which may well have reflected such a significant disparity in qualifications as to pass muster under the Seventh Circuit's standard. Accordingly, nothing in *Seaman* suggests that the mere presence of *any* difference in the qualifications between a plaintiff and another candidate, *by itself*, can support a jury verdict of intentional discrimination, the rule espoused by Petitioner.

In conclusion, the decision below simply reflects an unexceptional application of the standard that the circuits uniformly have developed to assess the probative value of comparative qualifications evidence. Review by this Court would serve no purpose.

III. THE DECISION BELOW IS CONSISTENT WITH THE PURPOSES AND POLICIES OF THE FEDERAL EQUAL EMPLOYMENT OPPORTUNITY STATUTES.

The Petition should be denied for the further reason that the decision below is fully consistent with the underlying purposes and policies of Title VII of the 1964 Civil Rights Act and 42 U.S.C. § 1981, the statutes on which Petitioner based his promotion discrimination claim, as well as the other equal employment opportunity statutes listed at page 24 of the Petition.

Title VII does not require an employer to grant preferential treatment to minorities or women. *McDonnell Douglas*, 411 U.S. at 800. *See* 42 U.S.C. § 2000e-2(j). The statute was not intended to "diminish traditional management prerogatives." *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979). Among those traditional prerogatives is the employer's right to judge

for itself which of two candidates is better-qualified for a position. Absent probative evidence of a discriminatory motivation, "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability[.]" *Burdine*, 450 U.S. at 259. In *Burdine* this Court expressly rejected an interpretation of Title VII that would have required an employer "to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. . . . Title VII does not obligate an employer to accord this preference." *Ibid.*

Allowing a jury to conclude that an employer has engaged in intentional discrimination simply based on the jury's second-guessing of the employer's assessment of candidates' relative qualifications under circumstances such as those present here would be contrary to these fundamental principles, as the Seventh Circuit recognized in its decision.

> [A] court's "role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second-guesses employers' business judgments." *Simms*, 165 F.3d at 1330. . . . If we were to allow a jury to evaluate competing credentials to determine whether the employer's assertion that it selected the best candidate was pretextual, the jury would in most cases be replacing the employer's personnel department.

Pet. App. 21a. There is neither logical nor legal justification for a rule that would allow a jury to find that an employer's explanation that it selected the person it judged to be the superior candidate was a lie simply because the qualifications of the plaintiff and the selected candidate differ in some respects and the jury, in its own judgment, ranks the candidates differently — much less a rule that would permit such a finding

to serve as a basis for an inference that the employer's true motivation was unlawful racial discrimination.

If employers know that a jury verdict of intentional discrimination based solely on insubstantial differences in candidate qualifications — based on the jury's "second-guessing" of the employer's judgment — cannot be overturned, employers will be forced to give preference to protected-group candidates whenever their qualifications are not manifestly inferior to candidates the employers prefer for nondiscriminatory reasons. This is precisely the outcome that this Court rejected in *Burdine* as antithetical to the underlying purposes of Title VII.

Petitioner complains that the standard that the courts uniformly apply is somehow "asymmetric," that "employers may defeat discrimination claims by proving that the plaintiff was comparatively *less* qualified, but plaintiffs (generally) cannot support such claims by demonstrating that they were *more* qualified." Petition at 13 (emphasis in original). The flaw in Petitioner's analysis is palpable. It ignores both that it is the plaintiff who bears the burden of persuasion, not the employer, and that the ultimate issue on which he bears that burden is whether the employer's choice of the other person was because of the plaintiff's protected status, not whether the selectee was or was not the "better-qualified" candidate. If an employer proves that the plaintiff in fact was less-well qualified, and the plaintiff has offered no direct or circumstantial evidence of discrimination other than the mere disparity in qualifications (*see Patterson*, 491 U.S. at 188), there is simply no basis for a finding that the employer has violated Title VII. On the other hand, a jury's conclusion that the plaintiff was better qualified than the individual selected will not logically support a finding that the employer's explanation that it selected the superior candidate was a lie — much less an inference that the true reason was an

unlawful one — unless the disparity in qualifications is so manifest that the possibility that the employer and the jury simply have a good-faith disagreement over the identity of the better candidate can be excluded.

Ultimately, Petitioner's complaint with the decision below is that few if any plaintiffs supposedly will be able to prove claims of promotion discrimination under the standard applied in this case and that some plaintiffs will fail to prevail even though they "might well have been more qualified than the individual who was actually awarded the position in question." Petition at 18.[16] Title VII prohibits an employer from discriminating against a plaintiff because of his race — it does not penalize an employer for having made an erroneous or even a foolish assessment of candidate qualifications. *Burdine*, 450 U.S. at 259.

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16. Indeed, Petitioner asserts at page 13 of his Petition that, "among the scores of such decisions there appears to be only a single case in which a plaintiff succeeded in meeting this strict standard." *See also* Petition at 18. Petitioner does not purport to have surveyed all of the employment discrimination cases that have gone to judgment since 1964, much less those cases that have been settled where a disparity in qualifications was the only evidence the plaintiff possessed. Accordingly, his assertion, based on his review of a limited number of reported decisions, is simply meaningless. Moreover, the fact that there have been many instances in which the plaintiff's evidence of discrimination has been found to be insufficient says nothing concerning the correctness of those decisions or their fealty to the policies that underlie the equal employment opportunity statutes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARTHA L. SHAFF
BETTY, NEUMAN
& MCMAHON, L.L.P.
111 East Third Street
Suite 600
Davenport, IA 52801
(563) 326-4491

JAMES S. WHITEHEAD
Counsel of Record
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Counsel for Respondent

Supreme Court, U.S.
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(3)

No. 02-120

IN THE

Supreme Court of the United States

GARY MILLBROOK,

Petitioner,

v.

IBP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

ERIC SCHNAPPER
University of Washington
School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

JOHN F. DOAK*
KATZ, HUNTOON & FIEWEGER, P.C.
200 Plaza Office Building
1705 Second Avenue
P.O. Box 3250
Rock Island, IL 61204
(309) 788-5661

Attorneys for Petitioner

* *Counsel of Record*

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ARGUMENT

I. The Decision of The Seventh Circuit Is In Conflict With Decisions of This Court

The parties are essentially in agreement regarding the nature of the legal standard adopted by the Seventh Circuit. Respondent correctly describes the decision of the court of appeals as follows:

> The primary holding of the court below is that, since Petitioner did not present evidence of qualifications that were so clearly superior to those of Harris . . . that *no reasonable person* could have believed the latter to be the superior candidate, Petitioner did not present "sufficient evidence" to permit a finding that IBP's statement that it believed Harris to be the better candidate was false.

(Br. Opp. 15-16) (Emphasis added). This is consistent with petitioner's contention that under the standard in question a plaintiff is obligated to show that an employer's proffered explanation is so implausible that it would fail the rational basis test. (Petition 15-16)[1].

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1. Within the last month the decision in this case has been described in similar terms.

> *Millbrook* stands for the proposition that a failure-to-promote claim which is based on the employer's comparison of the plaintiff's credentials and the credentials of another candidate is doomed to defeat, unless the plaintiff can show that her credentials are so superior to those of the person eventually selected as to render the promotion decision *unfathomable* unless the decision maker resorted to some criterion outside of the candidates' respective credentials.

(Cont'd)

Respondent also is correct when it characterizes the decision below as holding that proof of a plaintiff's superior qualifications which fails to meet the Seventh Circuit's demanding standard is simply devoid of evidentiary significance.

> In the instant case, the Seventh Circuit . . . ruled that Petitioner's comparative-qualifications evidence was lacking in probative value. . . .

(Br. Opp. 16; see Petition 14)[2].

The parties emphatically are in disagreement about the practical significance of the stringent standard utilized by the Seventh and as well as the First, Second, Fifth and Eleventh Circuits. Petitioner contends that the standard is so severe that it is virtually impossible to satisfy, and that the standard thus effectively bars plaintiffs from relying on evidence of comparative qualifications. (Petition 24). Respondent disagrees. (Br. Opp. 19). That issue is of controlling importance, since this Court as well as the Third, Eighth and Ninth Circuits have repeatedly held that evidence of differences in qualifications *can* be relied on to prove discrimination.

Actual experience with the standard endorsed by the Seventh, First, Second, Fifth and Eleventh Circuits is undisputed and dispositive. The petition sets forth 63 cases

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(Cont'd)
Myles v. City of Indianapolis, 2002 WL 1800352 *4 (S.D.Ind.) (July 31, 2002) (Emphasis added).

2. Although petitioner disagrees in several respects with respondent's characterization of the evidence in this case, those differences do not bear on the appropriateness of a grant of certiorari in this case.

since 1993 in which the standard in this case has been applied in the lower courts. Since the filing of the petition three additional such cases have been reported[3]. In 65 of these 66 cases the lower court concluded, as in the instant case, that the differences in comparative qualifications had no probative value because they were not sufficiently extreme and undisputed to meet that legal standard. (Petition 45a-51a). In the six years since a single isolated 1996 *district* court opinion[4], there is among the succeeding 62 decisions not one instance in which a plaintiff's evidence was deemed sufficient to meet that standard. No court of appeals applying that standard has *ever* found that it was satisfied. Respondent does not dispute the accuracy of the list of cases set forth in the petition, and does not contend that there is more than a single case in which any lower court has ever concluded that the standard at issue in this case had been met[5].

Employers invariably defend cases alleging discrimination in promotion and hiring by asserting that the plaintiff was less qualified than the successful applicant. This Court

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3. *LeBlanc v. The TJX Companies, Inc.*, 2002 WL 1787953 *7 (M.D. Fla.) (July 16, 2002); *Myles v. City of Indianapolis*, 2002 WL 1800352 *4 (S.D.Ind.) (July 31, 2002); *Daniels v. Home Depot, Inc.*, 2002 WL 1398643 *10 (E.D.La.) (June 26, 2002).

4. *Dudley v. Wal-Mart Stores*, 931 F. Supp. 773, 805-06 (M.D. Ala. 1996).

5. Respondent objects that the petition does not "purport to have surveyed all of the employment discrimination cases that have gone to judgment since 1964." (Br. Opp. 25 n.16). But the issue here is what has occurred in decisions applying the restrictive standard endorsed by the Fifth, Seventh, Tenth and Eleventh Circuits. We emphatically do purport to have surveyed all of those cases, and respondent does not contend that our survey is either incomplete or inaccurate.

has repeatedly held that in such cases a plaintiff may seek to prove pretext by showing that he or she was in fact better qualified than the individual who was hired or promoted. *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1980); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). Those decisions are obviously inconsistent with a standard under which such evidence regarding comparative qualifications is virtually always "lacking in probative value." (Br. Opp. 16).

The decisions of this Court, of course, do not permit a jury to return a verdict for a civil rights plaintiff merely because the jury believes that the employer promoted a less qualified candidate; the trier of fact must also find that the promotion decision was in fact motivated by race. In the instant case the trial judge specifically explained that distinction to the jury[6], and respondent has never questioned the adequacy of that instruction.

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6. You are not to substitute your judgment for IBP's business judgment, or decide this case upon what you would have done. It is not your job to decide whether IBP's decisions with respect to Plaintiff's employment, or the reasons IBP has given for making those decisions, were good or bad, or right or wrong, or fair or unfair. You may not find for plaintiff simply because you disagree with IBP's decisions or with IBP's reasons for its decisions. An employer has the right to take those steps which it feels necessary to run its business, so long as it does not discriminate or retaliate.

Jury Instructions, p. 18.

II. The Decision of the Seventh Circuit Conflicts With Decisions of the Third, Eighth, Ninth and District of Columbia Circuits

Equally unavailing are respondent's efforts to reconcile the decision of the Seventh Circuit with decisions in the Eighth, Ninth and Third Circuits. In the Eighth Circuit, evidence regarding qualifications is probative unless it reveals only that the two applicants in question were "similarly qualified." *Chock v. Northwest Airlines*, 113 F.3d 861, 864 (8th Cir. 1997). The *Chock* standard is obviously very different than the Seventh Circuit's rule that evidence of *dis*similar qualifications is not probative, except where those differences are both (a) undisputed and (b) so extreme that no reasonable employer could have believed the plaintiff was the lesser qualified candidate. The *Chock* standard was easily satisfied in the instant case; had this case originated in the Eighth Circuit, the jury verdict would assuredly have been upheld.

The Ninth Circuit decision in *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 602 (9th Cir. 1993), holds that the trier of fact should give less weight to differences in qualifications "[t]he closer the qualifications of the candidates."[7] That holding is in two respects inconsistent with the Seventh Circuit standard. First, under the decision below the trier of fact ordinarily cannot give *any* weight to differences in qualifications, because such differences can almost never meet the Seventh Circuit's stringent standard. Second, under the Seventh Circuit standard there could never be occasion to give different (and in some instances lesser) weight to qualification disparities, because such disparities are deemed probative only when they are so great as to be conclusive.

7. In *Odima* the trier of fact was the district judge, so the opinion refers to the weight which the court should give to such evidence.

Respondent suggests that in the Third Circuit decision in *Seman v. Coplay Cement Co.*, 26 F.3d 428 (3d Cir. 1994), the evidence "*may well* have reflected such a significant disparity in qualifications as to pass muster under the Seventh Circuit's standard." (Br. Opp. 22). But in practice only 1 case out of 66 has ever met that standard; respondent's speculation that the facts in *Seman* "may well" have been such a rare case is palpably groundless. To the contrary, a decade of actual experience demonstrates that there is virtually no possibility that the evidence in *Seman* or any other case can ever satisfy that standard.

Respondent suggests that the opinion below is consistent with the 1996 decision of the District of Columbia Circuit in *Fischbach v. District of Columbia Dept. of Corrections*, 86 F.3d 1180 (D.C.Cir. 1996). (Br. Opp. 17). But the standard utilized in the District of Columbia Circuit has since been modified by the en banc decision in *Aka v. Washington Hosp. Center*, 156 F.3d 1284 (D.C.Cir. 1998) (en banc)[8]. Under the Seventh Circuit standard an inference of discrimination can be drawn only if "there can be no dispute among persons of impartial judgment" that the plaintiff was clearly better qualified (Pet. 20a), i.e. only if any reasonable jury *must* conclude that the plaintiff was far better qualified. Under *Aka*, on the other hand, an inference of discrimination can be drawn even if there *is* a good faith dispute about the comparative qualifications, so long as the jury "*could*" find that the plaintiff's qualifications were significantly greater. *Aka*, 156 F.3d at 1294 (inference permissible "[i]f a factfinder *can* conclude" plaintiff was significantly better qualified) (emphasis added), 1297 (jury verdict affirmed because "[a] reasonable juror *could* conclude that" plaintiff was more

8. Two of the panel members in *Fischbach* dissented in *Aka*, Judges Silberman and Ginsburg.

knowledgeable; "a reasonable juror *could* therefore find" that plaintiff was significantly more qualified") (emphasis added), 1298 (inference of discrimination permissible "in cases where a jury *could* reasonably find" the plaintiff was significantly more qualified) (emphasis added). *Aka* permits an inference of discrimination under circumstances in which the decision below would preclude drawing any such conclusion.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JOHN F. DOAK*
KATZ, HUNTOON
& FIEWEGER, P.C.
200 Plaza Office Building
1705 Second Avenue
P.O. Box 3250
Rock Island, IL 61204
(309) 788-5661

ERIC SCHNAPPER
University of Washington
School of Law
1100 N.E. Campus
Parkway
Seattle, WA 98105
(206) 616-3167 *Attorneys for Petitioner*

* *Counsel of Record*